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STATE OF MICHIGAN.

1859.

DOCUMENT NO. 8.

ANNUAL REPORT of the Attorney General.

ATTORNEY GENERAL'S OFFICE,
Lansing, March, 1860.

To His Excellency MOSES WISNER, *Governor of Michigan:*

SIR—I have the honor to submit to you my official report for the year 1859. In consequence of the delay of most of the Prosecuting Attorneys in forwarding to me their reports, I have been unable to present my own until the present time.

THE CASE OF WILLIAM TYLER.

A criminal case of much interest arose in the State in the fall of 1858. The brig *Concord*, owned by parties in Cleveland, Ohio, on her homeward passage from the Upper Lakes, stopped at Port Sarnia, in Canadian waters, at the outlet of Lake Huron. While lying there, moored to the Canada shore, she was, at a late hour on the night of the 29th of November, boarded by William Tyler, a Deputy United States Marshal of this District, accompanied by a *posse* from Port Huron, on the American side of the River St. Clair. Tyler had in his possession at the time a warrant issued by the United States District Court in

Admiralty, commanding him to seize the *Concord* and detain her to await the action of the court upon a libel filed therein by Sheldon McKnight, the libellant, charging that in a collision between her and the propeller "*General Taylor*," off White Fish Point, Lake Superior, the propeller belonging to him, had been damaged by the negligent conduct of the officers and crew of the *Concord*. The warrant bore date November 19th. Tyler went on board, armed with a loaded pistol, (revolver.) His assistants were on board a small tug, which was secretly made fast to the brig, and, under instructions from Tyler, held themselves in readiness for a "fight," being armed with various implements. Tyler mounted the rail of the brig, and while standing upon it, was accosted by *Henry Jones*, her master, and asked what he wanted. Tyler replied that he was a Deputy United States Marshal; that he had a warrant to attach the brig, and had come on board for that purpose. Jones replied that the brig was lying in British waters, beyond the reach of his process, and that he could not take her. Tyler rejoined, with an oath, that he would, cost what it might; that he was a United States Marshal, and as such had a right to seize her. The parties were standing within some four feet of each other, Tyler on the rail and Jones on his own deck. The altercation was brief, but warm; and while Jones was declaring energetically, "the first man who steps his foot on this vess—," Tyler fired his pistol at his head. The ball entered the head just above the left temple, and Jones fell senseless on the deck. He was immediately taken across the River to Port Huron, in St. Clair county, and there died in a few hours afterwards, from the effects of the shot. Tyler was at once apprehended by the local authorities, and brought to Detroit. Here he was complained against before a United States Commissioner, and for want of bail, committed to prison to await the action of a grand jury in the Federal Court.

It is proper here to add that Tyler resided at Detroit, and had been for some time employed by the United States Marshal in serving Admiralty process up and down the river, in which employment he had on a few previous occasions seized vessels in British waters, pretending that he had received from certain professional gentlemen at Detroit, advice to the effect that he had a right to serve the Admiralty process wherever he could find the craft afloat, whether in American or Canada waters. On the present occasion there is good ground for believing that he was promised a very liberal reward if he would seize the Concord and bring her in; and the fact is beyond dispute that for three days before the homicide was committed he had been making careful preparations to resort to deadly violence in case he should meet with resistance; that during all this time he well knew that the Concord was lying at Sarnia, and that on several occasions he exhibited his pistol to others, and in a boastful and swaggering manner, threatened to use it for the purpose of effecting the seizure even in Canadian waters, and to take the life of any one who should resist him in the attempt. He was also, on his way from Detroit to the scene of the murder, admonished by at least a half a dozen experienced men that he had no right or authority to serve his writ on the other side of the boundary line, (which is the centre of the river,) and advised not to go there for any such purpose. To all these friendly warnings he turned a deaf ear, vehemently asserting that he had the right, and threatening to shoot down any person who should make resistance, and even offered an extravagant sum of money to certain persons to accompany and assist him.

Being committed to jail on a United States warrant, he remained in confinement at Detroit, until the 15th of March, 1859, when a special grand jury was summoned by the Court to act upon his case.

In the meantime, as Jones' death had taken place within

the limits of this State, and thus presented a case of felony under the laws of the State, if the mortal blow was not justifiable, I advised the Prosecuting Attorney of St. Clair county to lay the facts before a grand jury of that county, and procure him to be indicted. The Prosecuting Attorney (Mr. McAlpine,) at once complied with the suggestion; and on the 4th of February, some five weeks before he was indicted in the Federal Court, a grand jury of that county found a bill against him for murder. This indictment was founded upon §5944 of the *Compiled Laws* of 1857, which provides "that if any such mortal wound shall be given, or other violence or injury shall be inflicted, or poison administered on the high seas or other navigable waters, or on land, either within or without the limits of this State, by means whereof death shall ensue in any county thereof, such offense may be prosecuted and punished in the county where such death may happen." It seems from the language employed that the essence of the defense consists in the fact that the violence used, though committed abroad, attaches to and accompanies the victim into the jurisdiction of our State, and there destroys his life; the murderous intent and the murderous act are contemplated as being united and as continuing their effect upon the victim after he has, by whatever means, arrived within our jurisdiction;—the unlawful death is really the crime which the offender, although not personally present, has committed within our borders; and the legislature plainly intended—and it is a consideration redounding to their honor as evincing their scrupulous care to punish crime—not to allow the State to be the asylum of felons who have sought the lives of their fellow creatures abroad, but who have escaped condign punishment in the place where the mortal blow was given.

Knowing that the accused was held in confinement under process of the United States, I abstained, out of regard to the federal authority, and in order to avoid every

appearance of a collision between it and the authority of the State, from all attempts to arrest Tyler on the State indictment until he should be discharged from the claims of the United States; not because I supposed the judicial authority of the State over his person was suspended by the fact that he was in the custody of the Federal Court—a doctrine the truth of which I deny and which, in cases where such Court has no jurisdiction, it would be absurd and ridiculous to contend for,—but because I was unwilling by any action on my part to produce even the semblance of a hostile collision between the State and Federal judiciary. I might have proceeded by *habeas corpus* to test the jurisdiction of the Federal Court in the case, but omitted to do so for the reason above given. Preferring to permit the Federal authorities to proceed in the matter until they had done with Tyler, I took no other step until they had finished with him.

On the 4th Tuesday of March, a grand jury, summoned by the United States Marshal, assembled to act upon the case of Tyler,—a case thought worthy of this particular attention by the District Judge. It was a special term of the Circuit Court of the United States for the District, held and presided over by the District Judge. Feeling a deep interest in the question whether the Court possessed power and jurisdiction to try the prisoner for a crime committed not within the district, nor within the limits of the United States, I ventured to suggest to his counsel (Mr. C. I. Walker and Mr. George V. N. Lothrop) that I entertained doubts as to the jurisdiction of the Court over the case; that I felt quite confident the Federal Court had no right whatever to try him, and that the only jurisdiction to which I held him to be amenable was that of the State Court. I earnestly urged them to raise this question of jurisdiction before the Federal Court, but they refused, taking the ground that the latter Court possessed full and ample ju-

risdiction of the offence, under the laws of the United States.

The District Judge charged the grand jury in unequivocal terms that the Court had jurisdiction of the offence, under the act of Congress of March 3, 1857, entitled "*An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes.*" Section 1st of that act being the clause under which this strange and anomolous jurisdiction was claimed, and under which the proceedings was had, is as follows:

"*Be it enacted, &c.* That if any person or persons upon the high seas, or in any arm of the sea, or any river, haven, creek, basin, or bay, within the *Admiralty jurisdiction* of the United States, *and out of the jurisdiction of any particular State*, shall unlawfully, wilfully, but without malice aforethought, strike, stab, wound or shoot, at any other person, of which striking, stabbing, wounding or shooting, such person shall afterwards die upon the land, within or without the United States, every person so offending, his or her counsellors, aiders and abetters, shall be deemed guilty of the crime of manslaughter, and upon conviction thereof shall be punishable as hereinafter provided."

The punishment provided by section three, is imprisonment, with or without hard labor, for a period not exceeding three years, and a fine not exceeding $1000, at the discretion of the Court.

Tyler was indicted in the Circuit Court for *manslaughter* under this statute, and put upon his trial before a traverse jury, summoned by the United States Marshal for that purpose. Many of the important facts of the case, going to charge the prisoner with a malicious and premeditated homicide, were not laid before the jury; but as it was, enough was shown to satisfy every unprejudiced mind that the act was willful and malicious.

The District Judge charged the jury, in substance, as follows:

1st. "That under the issue they had nothing to do with the consideration of the homicide as murder, though if the act had been committed in a sudden heat the use of the pistol would have constituted the offence murder at common law;

2d. That the issue being voluntary manslaughter or not, the evidence showing accident, and the absence of all intention to kill or do a bodily hurt, made the offence *involuntary manslaughter*, if the jury believed that the act was committed on the Canada side of the boundary line; for the defendant had no right as a Deputy Marshal to serve his process without the bailiwick of the Marshal; and the use of the pistol in the enforcement of process is of itself an unlawful act;

3d. To justify a killing in self-defence it must appear that the party [killing] could not escape from his assailant; which was not made out by the evidence, as the defendant could have jumped back upon the tug without danger;

4th. Whether the homicide was accidental or not, was a question for the jury; but if accidental, the homicide was not excusable if committed in the performance of an unlawful act;

5th. The jury were the judges of the credibility of the witnesses, and the discrepancy as to the main fact must be determined by preponderance and consistent probability;

6th. The prisoner was entitled to any reasonable doubt arising from evidence, whether or not the explosion [of the pistol] was accidental;

7th. There can be no doubt as to the unlawfulness of the act, for as a question of law the Court settle the point that the brig Concord, moored to the Canada shore, was without the United States and that the defendant had no

right to seize her; and was therefore guilty of at least a trespass in taking possession of her."

Such was the charge of the District Judge to the jury. He did not instruct them that the Court had no power to try Tyler at all, which in my opinion he ought to have done; but, as the prisoner's counsel did not raise that question he deemed it best to take it for granted that he possessed jurisdiction of the offence, and acted upon that assumption.

The jury were out three hours. When they came in their foreman enquired of the Court, "*Whether the jury could render a modified verdict?*" to which the Judge replied that they were confined to the issue and must find the prisoner guilty or not guilty. One of the jury then stated that the jury were unanimously of opinion that the act was *accidental*, and requested further instruction "as to the law of *involuntary homicide;*" and the charge upon that point was repeated. They then retired, and in ten minutes brought in the following verdict:

"The jury find the defendant guilty of manslaughter; but unanimously recommend the prisoner to the mercy of the Court, *and say that they believe that the killing was involuntary and unintentional on the part of the respondent.*"

Without wasting criticisms upon this extraordinary verdict, it is sufficient to say of it, that if the jury honestly believed what they said, that the killing was "involuntary and unintentional," they ought, as honest men, to have found the prisoner not guilty even of manslaughter, for it is monstrous to punish a man for an act which he commits unwillingly and unconsciously, and which he has no *intention to commit*. We have heard of a certain self-called religious tribunal which was once in the habit of punishing the mere intention of the accused, without waiting for proof of any overt act of crime; but it remained for this, an American jury, to find a man guilty of doing an act by

mere accident, in which not his malice nor even his intention concurred! The very frame and form of the verdict conspire to show that a violent struggle was going on between a downright conviction on the part of the jury, of the prisoner's guilt, and a determination on their part to shield him, so far as lay in their power, from the punishment justly due his crime. The verdict was a perfectly fitting consummation of such a struggle.

The Judge manifestly regarded it as a substantial acquittal, for he sentenced the prisoner to thirty days imprisonment in the jail of Wayne county and to pay a fine of one dollar to the United States.

At the end of this period, I caused Tyler to be arrested by the Sheriff of St. Clair county, and arraigned before the Circuit Court of that county on the indictment found on the 4th of February. On his arraignment in that Court on the charge of murder, he put in the plea of *autre fois convict*, setting up as his defense the indictment, trial and conviction in the Circuit Court of the United States. Under my instructions the Prosecuting Attorney of the county replied to this plea, that the mortal stroke was given within the British dominions, on St. Clair river, without the Admiralty jurisdiction of the United States, and that the Federal Court had no jurisdiction of the offense. The prisoner's counsel demurred to this plea; and on presenting the questions of law to the Circuit Judge (Hon. S. M. Green) he reserved them, as authorized by the statute, for the consideration of the Supreme Court of the State. The questions thus reserved are the following:

"*First.* Had the United States, at the time of said conviction and judgment, Admiralty jurisdiction over the waters of the River St. Clair, which is without the boundaries of the United States and within the boundaries of the county of Lambton, in the Province of Canada, within the intent and meaning of the Act of Congress entitled "An act in addition to an act more effectually to provide

for the punishment of crimes against the United States, and for other purposes," approved March 3, 1857.

Second. Was the shooting of Henry Jones by the defendant in the manner and under the circumstances set forth in the said pleas and replications, and in the place set forth in the said replication, within the Admiralty and jurisdiction of the United States for the Seventh Circuit and District of Michigan, under the said first section of the act of Congress aforesaid."

At the October term of our Supreme Court, 1859, I participated in the discussion of these questions. The Court, after mature consideration, determined that the Federal Court had no jurisdiction to try Tyler for the offence; that the same was not committed within the *Admiralty jurisdiction* of the United States, and that both questions ought to be answered in the negative; and so certified to the Circuit Court. The case is reported in 7th Michigan Reports, p. 161.

After this decision and at the November term of the Circuit Court of St. Clair county, held on this occasion by Hon. B. F. H. Witherell, the prisoner was again arraigned, his former plea overruled, in accordance with the opinion of the Supreme Court, and he tried on a plea of not guilty. I assisted at the trial, and after a most patient investigation of the facts, the jury returned a verdict of *murder in the second degree.* There was not the slightest proof that the shot was fired involuntarily or unintentionally; but there was abundant proof that Tyler shot Jones wilfully, deliberately and intentionally, for the purpose of possessing himself of the Concord and bringing her to Detroit. Upon the whole evidence, I am satisfied that the crime was murder. Few cases of greater premeditation and deliberate purpose to kill, in the contingency of resistance to an unlawful act, are to be found.

The Circuit Judge sentenced Tyler to confinement in the State Prison for the period of only six years; and im-

mediately upon pronouncing the sentence suspended it by a formal order to enable the prisoner to prosecute a writ of error and bill of exceptions, to the Supreme Court of the State, founded not only upon the record in the case, presenting the same questions previously decided by the Supreme Court, (the former decision being merely advisory as to what disposition the Circuit Court ought to make of the questions reserved,) but upon points arising during the trial. The case is for hearing at the next April term of the Supreme Court.

I am informed that the British government has demanded of the government of the United States, the rendition of Tyler under the Ashburton treaty of 1842, as being guilty of an offence for which under that treaty he may be handed over by the President of the United States to the authorities of Canada for trial and punishment there. What action the President has taken on the subject of this demand has not yet transpired; but, inasmuch as the prisoner has committed an offence against the laws of this State and is now in the custody of our Courts, it is presumed the President will not undertake by means of his Executive warrant, to wrest him from our jurisdiction. Should he, a very grave and exciting question will at once arise, whether a prisoner detained on criminal process in a State Court of competent jurisdiction, charged and convicted of crime against her laws, can be by any power on earth legally snatched from her custody and turned over to other hands for trial for the same crime. Should such an attempt be made before the expiration of Tyler's sentence, it is not to be doubted that the State would in every legal way vindicate her sovereign right to the possession of the prisoner. After undergoing the State sentence on a conviction of murder, it would if possible be still more objectionable for the British government to claim, or the Federal Executive to surrender him for further trial and punishment. It is apprehended that not only a sense of

common justice would restrain our neighbors from pressing such a demand, but that the constitution of the United States, which declares that no person shall, for the same offence, "be twice put in jeopardy of life or limb," would present an insurmountable barrier to the exercise of such a power by the President. And hence I conclude that Tyler is solely amenable to the justice of this State.

If I have felt it my duty to give special attention to this case, it has been because of my anxiety to ascertain and preserve the boundary, not always very distinctly marked, between the judicial power of the United States on the one hand and that of the State's on the other. The history of the country and of its jurisprudence is full of admonition that this constitutional line of separation cannot be too scrupuously watched and guarded; and it teaches that not only have the Federal Courts, under the construction they have in some instances given to the grant of *Admiralty* power in the Federal construction, extended that jurisdiction far beyond the limits recognized by the earlier decisions of the Courts and the general understanding of the country; but that in other cases of the highest importance the Federal Courts have made decisions and advanced claims to judicial authority which strongly encroach upon the just rights of the States.

CASE OF ORIN C. WOOD.

It may not be without utility for me to allude to a case which has arisen in this State under the treaty of Washington, above mentioned, as showing the embarrassments to the reclamation of fugitives from justice produced by the interpretation put upon it by the British colonial authorities. The provisions of the treaty securing the right of mutual reclamation of such fugitives, are as follows:

"It is agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers or authorities, respectively made, deliver up to justice all persons who, being charged with the

crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminalty as, *according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed;* and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if on such hearing the evidence be sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requsition and receives the fugitive."—[*Art. X. of the Treaty; see U. S. Statutes at Large, vol.* 8, *p.* 576.]

At the May term of the Circuit Court of the county of Wayne, 1857, the grand jury found a bill of indictment for the crime of murder against one *Orin C. Wood*, a Canadian and a subject of the Queen of Great Britain, charging him with having on the first day of October, 1856, feloniously killed and murdered one *Calvin Cornell* at the city of Detroit, in said county. It seems that *Wood* was a young physician, settled and in business at Hillier, Prince Edward county, Canada; that *Cornell*, a plain, honest, healthy farmer, resided in his neighborhood and had patronized him on a few occasions; and that both started to come west, Cornell having a considerable sum of money

with him in gold, and intending to purchase lands in some of the western States, and Wood, without money, except a trifling sum for expenses, and merely offering himself as a sort of traveling companion to Cornell. They went together to Buffalo, New York, by water, and thence in a steamer to Detroit, both occupying the same state-room. Cornell was sea-sick on the voyage up the Lake, and Wood gave him medicine which appeared to increase rather than relieve the sickness. Arrived at Detroit, both occupied the same room at the hotel, Cornell still being sick. Wood still gave him medicine and called another physician; but to no avail. Cornell died the next morning, only a few hours after his arrival at Detroit. No money was found on his person, in his trunk or elsewhere, and he was buried by Wood the same day. Wood immediately left the hotel, pretending he was going west to Chicago, but in fact took passage at once for his home. After arriving at home, he was observed to have considerable sums in gold, although known to be poor. He was arrested in Canada by the local authorities on a charge of murdering Cornell. On the examination it appeared that the friends of the deceased had removed his body from Detroit to Toronto, and there subjected the stomach and intestines to a chemical analysis by skillful physicians. This analysis exhibited the presence of a deadly poison in those organs in quantity sufficient to destroy the life of a healthy person in a few hours, but the examining magistrate felt compelled to discharge Wood upon the ground, which was doubtless correct, that there being no proof of the adminstration of the poison in the province, and Cornell having died in Michigan, the prisoner had not committed the crime within the Canadian jurisdiction.

The evidence of his guilt, produced in this State, was almost wholly circumstantial, no one witness and no one circumstance alone, furnishing probable cause, but all the

facts, when properly connected furnishing almost irresistible evidence of his guilt.

On the finding of the indictment against Wood, I informed the Attorney General of Canada of the fact, (Appendix No. 4,) and at once proposed the necessary papers to procure a requisition from the President of the United States on the authorities of Canada for his extradition and trial in our Court, and enclosed them to General Cass, the Secretary of State. (*See Appendix, numbers* 1, 2, 3.) My communication was promptly replied to by Mr. Appleton, acting Secretary, informing that the government of the United States had made requisition on the British government through the resident British minister, for the surrender of Wood. (*See Appendix No.* 5.) On receiving this communication, I wrote the Solicitor General of Canada, requesting him to advise me whether the requisition had been received. (*Appendix No.* 6.) This letter was answered by a letter from the Attorney General's office on the 11th of June, informing me that it was impossible for the Canadian government, although it had received it, to surrender Wood merely on the requisition of the President; that an authenticated copy of the indictment would not be sufficient evidence of criminality to justify his arrest there, and that the evidence upon which the bill was found must be there produced. (*Appendix No.* 7.) Deeming the views presented in this letter incompatible with the true interest and meaning of the 10th article of the treaty. I replied to it in my letter of the 13th of June, (*Appendix No.* 8;) and on the same day again wrote the Secretary of State, (*Appendix No.* 9,) enclosing him a copy of the note from the Attorney General's office, (*App. No.* 8.) On the 17th, I again wrote him, (*Appendix No.* 10,) enclosing copies of two telegraph despatches, advising me that Wood had made his escape. On the 22d, Mr. Appleton addressed me a letter (*Appendix No.* 11,) advising me that the American government had once entertained the same

view of the sufficiency of an indictment which had impressed itself upon my convictions. Despairing however of being able to reclaim Wood, under such a construction of the treaty as was put upon it by the English government and under their statute passed to carry it into effect, I let the matter rest; but at length, on learning that Wood had probably committed a forgery against Cornell, I again called the attention of the Secretary of State to the case in my letter of the 21st December. (*Appendix No.* 12.) To this I received the reply of the Secretary dated Dec. 24th, enclosing me a paper which he treated as a copy of the Canadian statute for the "better giving effect to the 10th article of the treaty. (*Appendix Nos.* 13, 14.) It will be seen that the Provisional statute provides that if the Canadian Judge shall deem the evidence sufficient to sustain the charge "*according to the laws of the Province*, if the offence alleged had been committed therein," it shall be his duty to certify the same to the governor, &c.; and thereupon the latter is to issue a warrant for the arrest and extradition of the offender. It is obvious that this statute was intended as a legislative construction of the treaty, and that the Canadian Parliament, like the Imperial Parliament, have assumed to themselves, notwithstanding the terms of the treaty, to determine what kind, quality and amount of evidence shall be produced before they will surrender an accused person. This is plainly to render the treaty a dead letter and to transfer whatever force and effect its language has to the discretion of the legislative bodies;—indeed, to deprive it of all force, meaning and effect, except *such* as they may see fit to give it by statute; for if they may, without infringing the treaty, declare that evidence of a certain quality only shall be received, they may also declare that none shall be deemed sufficient, and thus totally annul and set aside this most salutary clause. But the common law of England from the earliest times, has regarded an indictment regularly found as sufficient

evidence of criminality to justify the apprehension and commitment for trial of the person charged; and this principle is universally recognized in the several States, and, it is believed, in Canada. Any statute or regulation to the contrary would be in itself such a singularity, such an anomoly, as to strike the community with astonishment. It will not be denied that had the crime in the present case been committed in Canada and the indictment found there, it would have justified the immediate arrest of Wood and his commitment for trial, under her laws. Upon what principle, then, her authorities could, upon a proper requisition from the federal government, refuse to give a corresponding or even any effect to a regularly found American indictment it is difficult for me to understand. I know indeed that all treaties do not possess the character of laws in the courts of the countries which are parties to them; yet in our own country the constitution itself gives them legal force and obligation in all our Courts, by declaring that they with all valid statutes shall be supreme laws of the land.

The Secretary of State in his letter of 24th December, remarks that the British statute "does not materially differ from the act of Congress for carrying into effect certain treaty stipulations between the United States and foreign governments for the apprehension and delivery of certain offenders and which will enable the pursuing parties, in this instance, to act understandingly in the matter." But on recurring to the statute he refers to, (*the act of Congress of August* 12, 1848,) it will be seen at once with what inattention the Secretary of State had read that statute,—or, I might perhaps say, with what an ingenious generality of statement he wards off the necessity of considering and deciding upon the real merits of the question before him; which was, Whether a duly authenticated copy of an indictment found by an American grand jury, without fraud or collusion, accompanied by a proper and sworn complaint

of the prosecutor, is, under the 10th article of the treaty, sufficient evidence of criminality to require the surrender of the criminal at the hands of the British authorities?

Now, on perusing the act of Congress it will be seen that the British statute, instead of "not differing materially from it," is wholly different from and incompatible with it. The act of Congress, so far from making the kind and quantity of the evidence of criminality to depend upon the legislative will, declares in terms that "if, on such hearing, the evidence be deemed sufficient by him, (the Judge of Commissioners,) to sustain the charge *under the provisions of the proper treaty or convention*, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of such treaty or convention."

This clause does not, like the British statute, leave the question of the kind and quantity of evidence to depend upon a local statute passed with direct reference to the case. It is plainly a non-claim of any such power on the part of Congress, but leaves the judge or other magistrate to determine the question upon the general principles of construction and evidence. It authorizes him in his judicial capacity to construe the treaty in the particular case and to judge of the admissibility and effect of the evidence, without being hampered by legislative restrictions, qualifications and prohibitions. The remark of the Secretary, whether hasty or upon deliberation, seems certainly in disparagement of the faith of the government of the United States in performing fully and fairly its obligations under the treaty. That government has by no means resorted to any evasions, shifts, or legislative constructions of the treaty; nor has any of the States. All are willing to fulfill requirements so promotive of peace, mutual good-will and

the cause of civilization; and it is to be regretted that the Secretary of State should have taken a view so unfavorable to our own government, without, so far as appears, even discussing the question with the British minister.

Encountering so serious an embarrassment from a quarter whence I could not anticipate it, I was forced to abandon all attempts to bring Wood to trial, and the indictment is still pending.

CASE OF THE PEOPLE OF THE STATE OF MICHIGAN AGAINST THE PHŒNIX BANK OF THE CITY OF NEW YORK.—HISTORY OF THE CLAIM OUT OF WHICH IT AROSE.

In my former reports I have alluded to this suit, and, in somewhat general terms, to the facts and circumstances out of which it grew. I now proceed to set them forth more in detail, because I think the people of the State are entitled to be fully informed of the same. The unfortunate five million loan of 1837 has been the fruitful source of trouble to the State, and the sequel will show that the transaction in question is among the numerous legacies of evil entailed upon us by that worse than useless loan.

The action against the Phœnix Bank is founded upon the claim of the State to be repaid, by the Bank, the sum of $35,603 74, allowed to the Bank by the Board of State Auditors on the 2d of December, 1854, and paid by the check of the late State Treasurer, B. C. Whittemore, in favor of Henry H. Brown, at that time Cashier of the Peninsular Bank, Detroit; Mr. Brown receiving the check for the Phœnix Bank and paying it out of the funds of the State then on deposit in the Peninsular Bank.

This allowance of the Board was based upon the following claim or account, presented to them on the twelfth of May, 1854, by George V. N. Lothrop, Esq., of Detroit, acting as attorney and counsellor for the claimants:

"JOHN DELAFIELD, *Agent of the State of Michigan,*
To PHŒNIX BANK, DR.

1838, March 13.

For draft on Farm. and Mechs. Bank, Detroit,.....	$8,500
" " *Bank of River Raisin,*.....	7,900
Both delivered to John Norton, Jr., Cashier, by order of Governor Mason, being for advances ac. State Bonds,.....	$16,400
Interest from 13th March, '38, to,.....	"

The Board of State Auditors, consisting of *B. C. Whittemore*, State Treasurer, *William Graves*, Secretary State, *Porter Kibbee*, Commissioner of the State Land Office, awarded, on the 2d of December, 1854, that "upon the evidence produced, said Phœnix Bank was justly and equitably entitled for principal and interest on said claim, from March 13th, 1838, to Dec. 2d, 1854, to the sum of $35,603 74,"—which was paid on the above mentioned check of the State Treasurer.

The Phœnix Bank of the city of New York, the claimant, pretended that these two drafts had been *lent* to the State on the request of Governor *Stevens T. Mason*, made to the old Phœnix Bank, a banking corporation in New York city, of which John Delafield, Esq., was at the time President.

As is well known, Gov. Mason had, by his letter of May 1, 1837, appointed Mr. Delafield his sub-agent to negotiate the five million loan; but his instructions, carefully drawn, admonished Mr. Delafield not in any of his transactions, to exceed the powers conferred upon him by the loan act, a copy of which he had received from the Governor. The latter at the same time placed in his hands a large amount of the State bonds for sale; but as Delafield found it impracticable to negotiate the bonds immediately, and as the Governor was anxious to raise funds to enable the State to proceed with the works of internal improvement, he en-

tered into an understanding with Mr. Delafield whereby the latter agreed to advance to the State the sum of $150,000. For this amount Governor Mason drew two drafts on Mr. Delafield, one for $90,000 and the other for $60,000, the former of which was placed in the hands of Mr. John Norton, Jr., for collection prior to the 20th of February, 1838. Norton was then the Cashier of the Michigan State Bank at Detroit, and was acting in that capacity when he received the draft for $90,000. He forwarded it to New York and presented to Delafield for acceptance or payment, but it was returned protested, Delafield refusing to honor it. On the return of the protested bill, Mr. Norton at once repaired to New York to inquire into the facts concerning it; and on the 24th of February, 1838, Gov. Mason wrote to Mr. Delafield (through Mr. Norton, then in New York,) that "*if he* (D.) *had received funds on the bonds in his possession*, he might transfer to Mr. Norton $50,000 or $100,000, taking his certificate of deposit from 'John Norton, Jr., Cashier of the Michigan State Bank, which will be cashed at the State deposit Bank." Mr. Delafield had received nothing whatever on the bonds in his hands and could not therefore lawfully make any such advance to Mr. Norton as was contemplated in this letter and it is perfectly plain that without such funds in Delafield's hands neither he nor Norton could by any act bind the State for any advances. Indeed, the law is well settled that in such a case under such an act the State agent has no power even to pledge the bonds for an advance of money. They must be actually sold, and sold for cash, without a credit. Such being the law, and Delafield having received no money on the State bonds, he could do no act to make the State legally liable. Norton was "fiscal agent of the legislature under a joint resolution of the two houses, passed on the 10th of January, 1837; but his powers simply related to the keeping of the public money deposited in the State Bank and its proper disbursement, and

d'd not at all extend to the borrowing of money or the entering into any other transaction on behalf of the State.

On presenting Governor Mason's letter to Mr. Delafield, the latter, instead of advancing money to Norton, applied to the Phœnix Bank, of which he was President, and procured from it two drafts, one for $8,500 drawn on the Farmers' and Mechanics' Bank, Detroit, and the other on the Bank of the River Raisin, Monroe, for $7,900, which were delivered to Norton by N. G. Ogden, the Cashier of the Bank. The account was made out by the Cashier and the receipt of them evidenced by Norton as follows:

"PHŒNIX BANK, NEW YORK,
13*th March*, 1838.

JOHN NORTON, ESQ., *Cashier:*

DEAR SIR—Please receive herein my draft on Farmers' and Mechanics' Bank, Detroit,..... $8,500
Do. Bank of River Raisin, Monroe, ... 7,900

$16,400

on account of advance made by this Bank on Michigan bonds, deposited with John Delafield, Esq., President.

Respectfully yours,

(Signed.) N. G. OGDEN.

Received of the Phœnix Bank the above letter.

(Signed.) JOHN NORTON, JR., *Cashier.*"

In the following October, Mr. Norton collected the draft for $8,500 on the Farmers' and Mechanics' Bank, and interest, and passed the avails to the credit, *not of the State* but of the Phœnix Bank, on the books of the State Bank, of which he was Cashier. He also presented the draft for $7,900 to the Bank of the River Raisin and was offered payment in currency, which he refused. The State not only never authorized him to receive these drafts on her account but has never by any statute, joint resolution or other act whatever, recognized them as a claim against herself, and has never received a cent upon them or been

in any way benefitted by them. From its inception she was a stranger to the transaction.

In the month of March, 1840, the Phœnix Bank, by letter addressed to the Cashier of the Bank of the River Raisin, forbade the payment of the draft of $7,900, if it had not then been paid, (as it had not,) and informed him that they should claim the amount.

On the 4th of June, 1838, Governor Mason, finding that he could not negotiate the loan to any advantage through Mr. Delafield, who, by a direct violation of his instructions touching the payment of the two drafts drawn on him by the Governor, amounting to $150,000, had already occasioned a loss to the State of $10,397 70, which Mason was compelled to pay for the State, (*see Documents of the House of Representatives of* 1839, *p.* 722, *&c.*,) deprived him of the agency; and by letter of that date directed him to give up all the State bonds in his possession. This request was at once complied with and all the bonds delivered up. On the same day, Governor Mason informed Mr. Delafield by a note of that date that he was of the impression that when he left Detroit the drafts on the two Michigan banks which had been delivered to Norton by the Phœnix bank, had not been paid; but that so soon as he should learn that such was the case, he would cause the amount to be remitted to him. In point of fact neither of them had then been collected; but whether collected or not, no one can pretend that this engagement of Governor Mason imposed any obligation whatever on the State, who was not in any sense a party to the original transaction and could not be made liable by any such undertaking of Governor Mason. The fact that he was Governor gave him no more authority thus to charge the State with a liability than the fact that Norton was fiscal agent enabled him to do the same thing. The State had not by her laws imparted any authority in either case.

Thus the matter stood until the summer of 1840, when

the Phœnix Bank fully empowered Charles H. Stewart, Esq., an Attorney, at Detroit, to settle the claim for $16,400, in any manner he should see fit. His powers as their agent were ample and complete; and though the Bank well knew that its proper debtors were the State Bank and the Bank of the River Raisin, it still kept up the idea that it was against the State—although in its letter conferring the agency upon Mr. Stewart it authorized him to avail himself of any proposition that might be made from any other quarter than the State of securing the debt. The power, however, to come to an absolute settlement of the claim "as in his judgment should seem right and proper and best calculated for the security and ultimate recovery of the same," was expressly given to him.

Clothed with such powers, Mr. Stewart, on the 22d of Sept., 1840, laid the matter before E. P. Hastings, Esq., then Auditor General, accompanied by a proposition that he (Stewart) should take such security from the two Michigan Banks as he could obtain (both said Banks acknowledging their liability to the Phœnix Bank,) and hold the same "for the benefit of the party ultimately entitled;" and "to transfer it to the State in case she should recognize her indebtedness; if not, then to the Phœnix Bank." Mr. Hastings agreed to the proposal, but "under the express understanding that in doing so he did not in any manner recognize the claim nor give it any validity or effect against the State more than it then had."

On the next day, September 23d, Mr. Stewart applied to the Bank of the River Raisin for payment of the fund against which the draft for $7,900 was drawn. The cashier, Mr. Haskell, produced to him the letter of the preceding March, countermanding the draft, and expressly refused to admit that the State had any concern in the matter. The Bank then turned over to Mr. Stewart property valued at $8,508 25, which Mr. S. accepted in payment of this branch of the claim, and gave the Bank a

receipt for it, "in full payment of their indebtedness to the Phœnix Bank for money collected on their account." On the 2d of Oct., Mr. Stewart applied to the State Bank for payment of the other branch of the claim; and they also turned over to him property valued at the sum of $9,155 53, which he accepted, and at the foot of the account for the avails of the draft for $8,500 and interest, and of the list of the property turned out, added his receipt, as follows: "Received the above in full discharge of the foregoing account." Both these receipts had remained in the possession of the respective Banks from their dates down to the spring of 1855, accessible to any person having an interest in them, the one at Detroit, the other at Monroe. Among the assets received from the State Bank was a deed of 2,397.40 acres of land, lying in Saginaw county, conveying the same to Stewart "in trust for the Phœnix Bank of the city of New York, or for the Auditor General of the State of Michigan, whichever should assume the debt hereby settled by the party of the first part" (the State Bank.)

That these settlements operated as a full extinguishment and satisfaction of the whole claim, as between the debtor Banks and the Phœnix Bank, no one can deny; and yet the Phœnix Bank presented its pretended claim to the Legislature. The only action of that body upon it was at the session of 1841, in the House of Representatives, at which the chairman of the committee on claims in the House made a report recommending that the claimants have leave to withdraw it, which was granted, (*House Journal* 1841, *pp.* 245, 670;) although it seems to have been made known by the agent of the Bank to *committees* for several years thereafter, and perhaps as recently as 1845. Governor Mason never, in any of his communications to the Legislature, nor in his examination before the select joint committee at the session of 1839, (*House Doc. of* 1839,) even alluded to this claim; and I have not been

able to discover the slightest evidence that any subsequent Governor, or other State officer, ever gave it the least approval or countenance, except the Board of State Auditors who allowed it in December, 1854.

On the 5th of August, 1852, the Phœnix Bank called upon Mr. Stewart, their agent, then in the city of New York, and required him to convey to them the Saginaw lands, and to come to a final settlement with them touching his agency in the premises. He had used for his own purposes, but with the full knowledge and consent of the Bank, and as part of his regular compensation as their agent, all the property and assets he had received from the State Bank, except the Saginaw lands, and the *whole* of the assets he had received from the Bank of the River Raisin. On that day he conveyed to the Phœnix Bank all the Saginaw lands, inserting in his deed a covenant of warranty as against his own acts only; and at the same time entering into a full settlement with the Bank for his services as their agent or attorney. This settlement paper, of the same date as the deed from him to the Bank, recites the facts that the draft for $8,500 had been paid by the F. & M. Bank, and that the draft for $7,900, on the Bank of the River Raisin, *had not been paid;* and further, that Stewart had from time to time informed the Bank of all his proceedings. It discharges him from all claim or demand to account for the property he had received, and gives him $525 in addition, he agreeing to pay off the taxes on the Saginaw lands, and the Bank covenanting to furnish him the money to do so.

Thus the title of these lands passed absolutely to the Phœnix Bank, and all the other property to Mr. Stewart. This was manifestly an election by the Bank to accept the lands, and to abandon all claim as against the State, inasmuch as the State had never been unwise enough to "assume" a debt which she never contracted, and had never recognized directly or indirectly. But it seems the

Bank was not yet satisfied. It was still inspired with the idea that it might induce the State to indemnify it against the consequences of its own folly in intrusting the drafts to Norton, and against its expenditures to its agent.

H. H. Brown, President of the Peninsular Bank, Detroit, was for a long time the correspondent of the Phœnix Bank, at Detroit. His deposition, as well as those of *B. C. Whittemore*, the State Treasurer from April, 1850, to January 1, 1855, *Porter Kibbee*, the Commissioner of the State Land Office during the years 1853 and 1854, *William Graves*, the Secretary of State during the same period, (the three last named State officers constituting the Board of State Auditors,) were all taken at Detroit under a commission issued by the Court, previously to the first trial of the cause in New York, as well as that of Mr. G. V. N. Lothrop, the attorney of the Phœnix Bank, who prosecuted the claim before the Board.

Mr. Brown testified that during the years 1852, 1853 and 1854, he had repeated conversations at the Phœnix Bank with Thomas Tileston, the President, and Henry Carey, the Vice President of the Bank, in which they gave him a history of the claim, and that neither they nor any other officer of the Bank ever informed him that the Bank had ever ever received any security, lands, judgments, bonds, mortgages, notes, or other valuable thing, either as security, or in settlement of the claim; and that in the month of November, 1854, only one month before the claim was allowed, Mr. Tileston offered to sell it to him upon the condition that he should guaranty the collection of the face of it; that is, $16,400. Mr. Brown swears that he agreed to this. Mr. Whittemore swears that in the summer of 1852 he had two conversations with Tileston and Carey at the Phœnix Bank; that they then showed him books and vouchers which, upon their face, showed that the claim had never been paid, and urged him to bring it before the Board; that they said Stewart once had charge

of the claim, but that he had never collected or settled any part of it; and Mr. Whittemore adds, that nothing was said by them, or either of them, in relation to said claim, or any part thereof, having ever, in any way, been paid or secured. Mr. Whittemore being a member of the Board, and bound to act officially on the claim, this treatment of him by the officers of the Bank cannot be looked upon in any other light than a deliberate attempt to deceive and mislead him—and the attempt was successful.

The other members of the Board swear that they, too, were wholly ignorant of the previous settlements by Stewart, of the trust deed of 1840, and the deed from Stewart to the Phœnix Bank of August 5th, 1852, and the settlement between Stewart and the Bank of that date, as well as all Stewart's other transactions touching the claim. In addition to the witnesses above named, *Mr. Haskell*, the Cashier of the Bank of the River Raisin, and *George F. Porter, Esq.*, the President of the Michigan State Bank, were examined as witnesses under the same commission, which was executed at Detroit before Jeremiah Van Rensellaer, Esq., the gentlemen appointed by the Court, in the summer of 1856.

The evidence shows that a part of the papers relating to the claim were placed in Mr. Brown's hands by the Phœnix Bank in January, 1852, and by him left with Messrs. Lothrop and Duffield, attorneys at law in Detroit, for collection. In June, 1853, Mr. Tileston visited Detroit, and had an interview with Mr. Lothrop in his office respecting the claim, at which time he delivered to him the rest of the papers relating to the claim, and among them the trust deed of 1840; which, it will be recollected, showed upon its face that it was given in *settlement of the debt due from the State Bank*. He, also, after this, sent to Mr. Lothrop the deed from Stewart of August 5th; and both these deeds were in Mr. Lothrop's hands during the pendency of the claim before the Board, as well as various

other papers showing the actings and doings of Mr. Stewart in relation to it. What was the precise character and purport of these other papers has not been fully proved, but enough appears to show that they were of a character to put the attorney on an immediate inquiry into all the facts of the two settlements, and that such an inquiry would, without expense, or the delay of a week's time, have brought to his knowledge every fact of any importance showing the absolute satisfaction and discharge of both branches of the claim. It does not, however, appear that he made any such inquiry, but contented himself, as he testifies, with the assurance given him by Mr. Tileston, at their interview in June, 1853, that the "Phœnix Bank had never accepted, received, or acquired, any interest under the trust deed of 1840, and that they never had anything to do with it."

The charter of the old Phœnix Bank expired by its own limitation, December 31st, 1853; but before it expired another banking corporation was created under the statutes of New York, to which all the property of the old, including this claim, was assigned through trustees; and thus the new Bank, known as the *Phœnix Bank of the City of New York*, the defendants in the suit, acquired all the interest of the old Bank therein. It was in reality but a mere continuation of the old Bank, having the same stockholders and officers, with a few exceptions, Mr. Tileston being its President, and the new corporation commencing its business as such, the first of January, 1854. Mr. Lothrop presented the claim to the Board of State Auditors on the 12th of May, 1854, for the new Bank, accompanying it with a written argument in favor of its allowance, but omitting all allusion to the two deeds in his possession or to the settlement made by Stewart. He furnished no proof whatever either of the legal liability of the State originally or of any subsequent recognition of the claim by it; but asserted that "the faith of the State had been violated and

that the Phœnix Bank had never been paid a dollar;" he assured the Board that he "would fairly and fully state every defence that he had ever heard hinted at," and in fulfilling this engagement assured them that he did not "know that the draft upon the Bank of the River Raisin had never been paid," and that it was immaterial whether it had or not; that he had "given a fair presentation of the claim;" that he had "no hesitation in saying in the most solemn manner that, as a lawyer, he had no doubt that any court of justice, could it be brought before them, would at once render judgment for the claimants," and "that he could not see how anything short of the grossest repudiation could justify its rejection." Mr. Lothrop's argument will be found in the Appendix, No. 15.

And it should be added that when examined as a witness in the case, Mr. Lothrop testified that although he had had the deed from Stewart of August 5th, 1852, in his possession from the time he received the deed of 1840, (from the State Bank to S. of the Saginaw lands,) yet that he did not remember to have ever noticed it until the February after the allowance and payment of the claim. Every man must judge of the credit due to so improbable an excuse for withholding all knowledge of it from the Board. Had either of these deeds been laid before them they could not for a moment have entertained the claim.

Hon. William Hale, then Attorney General, was requested expressly by a member of the Board, as he testified, to give the claim his attention, but never appeared before them on the subject; and the Board were wholly without legal adyice or any witness or testimony on behalf of the State. The Board held the claim under advisement till the 2d of December, 1854, when they allowed it, principal and interest, amounting to $35,603 74, for which Mr. Whittemore gave Mr. Lothrop his official check on the State Treasury, and which was duly paid to Mr. Brown, who accounted for the same to the Phœnix Bank.

On entering upon my office in 1855, I gave the matter of this allowance my attention, and after obtaining a full knowledge of the facts, by application to the State Bank and the Bank of the River Raisin, and also to other sources of information, and satisfying myself that the claim, as against the State, was totally unfounded in law or justice; that the State had never, directly or indirectly, been in any degree benefitted by the two drafts, nor received a cent on account of them; and that the allowance was obtained by fraudulent practices resorted to by the old Bank and the new, in the shape of false representations of the actual state of the case, and fraudulent concealments from the Board of most material facts which it was the duty of the Bank and its attorney frankly to make known to them, I brought an action, in September, 1855, in the *Superior Court of the City of New York*, to recover back the amount thus paid. This was with the advice of my friend *J. L. Jernegan, Esq.*, an able and learned member of the bar of New York. Much delay necessarily intervened in preparations for the trial, and it was first tried in the spring of 1857, before *Hon. Murray Hoffman*, at the special term of the Court. A large amount of testimony was put in on both sides, and after taking full time for consideration the Judge finally, on the 3d of July, rendered judgment in favor of the State for the full amount of the allowance, together with interest and costs, amounting in all to $42,152 97. In the very able opinion of Judge Hoffman, he sets forth with great clearness and force all the material facts of the case, showing that the claim never had any foundation in law or equity, and that it was entirely inequitable for the Bank to retain the money; but as he did not see fit in direct terms to charge the Bank and its agents with fraud in the procurement of the allowance, the defendants, on appeal to the general term of the Court in March, 1859, succeeded in getting the judgment set aside and obtaining a new trial for that technical defect

in his finding. A new trial was had before *Hon. Joseph H. Bosworth*, the Chief Justice of the Superior Court, holding the special term, in October, 1859, at which I assisted, as I had done at the trial in 1857. After a full and patient hearing, and after taking time for the re-examination of the depositions and other proofs exhibited on the trial, the Chief Justice, on the 28th of November, rendered judgment for the State for the whole amount of the claim, with interest and costs of suit, amounting to $48,115 97.

I annex hereto in full his official finding of the facts and his determination of the points of law arising in the case. (*See Appendix Nos.* 15 *and* 16.) It will be seen from the former (No. 15) that the Judge rests his judgment upon the fact that the Bank and its officers and agents practiced actual fraud upon the Board of State Auditors by means of false suggestions and fraudulent concealments touching the claim while pending before them; and that this was done contrary to their duty in the premises and with the deliberate intention to cheat and defraud the State.

The Bank again appealed to the General Term, and in March, 1860, I assisted in the argument of the case at the General Term. The Court has not yet decided the appeal.

Fully pursuaded that the allowance was procured by fraud, I renew my recommendation that no effort should be relaxed on the part of the State to recover the money. It is not easy to conceive of a more flagrant case of public plunder.

DISPUTES CONCERNING THE RIGHT TO COUNTY AND TOWNSHIP OFFICES.

In my last report, I observed: "The numerous applications to the Attorney General to file informations in the nature of a *quo warranto* to try the right of incumbents to their offices, and the long delays intervening in the Supreme Court (where they must now be brought) before a decision can be had,—always in most cases tantamount to a total deprivation of his rights to the claimant, have sug-

gested the inquiry whether some mode more expeditious and less expensive cannot be adopted. The multiplicity of elective offices and the endless disputes arising from errors committed at the polls or in the canvass, seem to me to make it necessary to provide some means of settlement short of a resort to the Supreme Court. I think the public interest would be promoted by providing for the determination of all cases respecting township offices, and perhaps even county offices, exclusively in the Circuit Courts, giving the party aggrieved the right to have the judgment reviewed in the Supreme Court." I earnestly renew this recommendation. The framers of the present Constitution seemed to have had in view the same statutory provision when they declared (Art. VI. § 8,) that the Circuit Courts have power to issue writs of *habeas corpus*, *mandamus*, *injunction*, *quo warranto*, *certiorari*, and other writs," &c.; yet the legislature have never seen fit to provide the machinery by which they might proceed by *quo warranto*. I think also they should be empowered to issue such writs in many cases where corporations are concerned. Under our various general laws authorizing the creation of plank road corporations, mining, manufacturing, mechanical, charitable, religious and literary corporations, these bodies are becoming numerous. Parties interested, instead of finding their articles of association in the statute book, are compelled to resort to the records in the office of the Secretary of State in order to find the name of the corporation and of the stockholders and officers; and, under the present state of the law, they are compelled, if they desire to test the legality of the corporation or of its acts, to resort to the Supreme Court and submit to an expense in so doing, a large portion of which would be saved were the local Circuit Court vested with the necessary powers to try and determine the question.

DISUSE OF INDICTMENTS AND GRAND JURIES.

It affords me pleasure to be able to report that the act of last session, (No. 138,) "To provide for the Trial of Offenses upon Information," has been found to work well in practice. Very few grand juries have been called since it went into operation, and a very great saving of expense to the counties has thus been secured. I have thus far heard of no instance in which complaint has arisen of any oppressive use having been made of the powers given to the Prosecuting Attorneys under the act; and I cannot doubt that, with such trifling modifications as time and experience may suggest, the mode now adopted will not only continue to be the policy of this State, but will be imitated by many of our sister States.

I annex hereto an abstract of the reports which have been made to me by most of the Prosecuting Attorneys of the counties. It will be seen that many of them are in default in respect to the reports due for the year 1859. As required by law, I have uniformly made known such default to the Treasurer of the proper county, with a recommendation to prosecute for the penalty affixed by law to such neglect; though I am constrained to say that since I have held my present office, (from Jan. 1, 1855,) I never yet have heard of any suit having been brought by the Supervisors for the penalty incurred by the Prosecuting Attorney for default in making his report. The penal clause of the statute appears to be a *dead letter*.

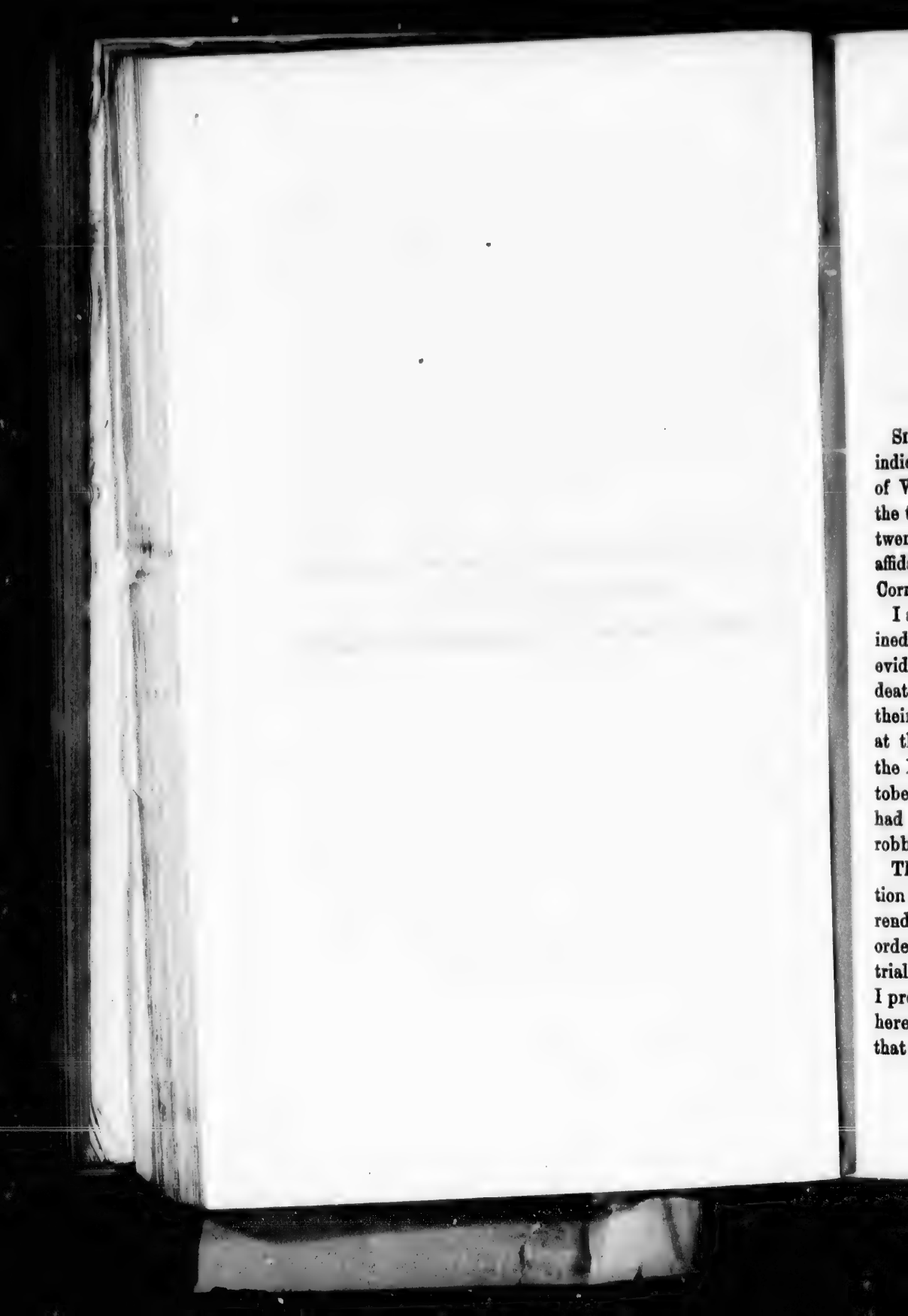
I have the honor to be,

Your obedient servant,

J. M. HOWARD,

Attorney General.

APPENDIX.



APPENDIX.

NO. 1.

ATTORNEY GENERAL'S OFFICE,
Detroit, May 27th, 1857.

SIR—Enclosed I send you an authenticated copy of an indictment for murder, recently found by the grand jury of Wayne County, against Orin C. Wood, a resident of the township of Hillier, in Canada, about one hundred and twenty miles east of Toronto, on Lake Ontario; also an affidavit of Jordan Cornell, a son of the deceased Calvin Cornell, named in the indictment.

I attended the grand jury who found the bill, and examined the witnesses, and read the documentary proof. The evidence strongly indicates that the deceased came to his death by poison, administered to him by the accused on their passage from Toronto to Detroit by way of Buffalo, at the close of September last, of which Cornell died at the Michigan Exchange on the morning of the first of October. There is, also, strong evidence that the deceased had about $3,000 in money on his person, and that he was robbed of it by Wood, who is a young physician.

The object of the enclosed papers is to obtain a requisition upon the British authorities in Canada for the surrender of the accused, and his delivery to an agent, in order that he may be brought to Detroit and put upon his trial. Should the President see fit to issue the requisition, I presume he will find it necessary to appoint some person here as agent to bring the prisoner to this State; and in that case I venture to suggest the name of *Frederick F.*

Egglinton of this city as a trusty and discreet person to receive such authority.

Should there appear to be any informality in the papers, or any further evidence be requisite in order to justify the issuing of the requisition, I shall feel obliged for early advices on the subject, and attend to the matter at once.

I ought to add that the matter has undergone a judicial investigation at Toronto, but that the counsel for the crown advised the discharge of Wood, not for the want of proof of his criminality, but on the ground that the crime was really committed and consummated in this State.

As the charge is a serious one, and there is danger that the accused may fly, I shall feel gratified by a reply at your early convenience.

I have the honor to be,

Your obedient servant,

(Signed) J. M. HOWARD,
Attorney General.

HON. LEWIS CASS, *Secretary State,*
Washington, D. C.

NO. 2.

State of Michigan, County of Wayne, ss.

I, Jordan Cornell, at present of the city of Detroit, in said county, on oath depose and say, that I reside in the township of Hillier, in Prince Edward county, Canada West, and in the family of my step-mother, Mrs. Elizabeth Cornell, the widow of the late Calvin Cornell, who died at the city of Detroit, in said county of Wayne, on the first day of October, A. D. eighteen hundred and fifty-six; that I am the eldest son of said deceased; that said deceased was the same person who is named in the copy of indictment hereunto annexed, and who is therein stated to have been killed and murdered on the day and year aforesaid by Orin C. Wood; that I am the complainant in said pros-

ecution; that upon credible information I verily believe the charge contained in said indictment to be true; that the said Orin C. Wood is now a resident of said township of Hillier, at a place called Wellington, about six miles from my own residence, and that I am personally acquainted with him. This deponent therefore prays that a proper requisition may issue for the surrender of said Orin C. Wood to the proper American authorities in order that he may be apprehended and delivered up for trial upon the said indictment, which is now pending in the Circuit Court for the county of Wayne, and State of Michigan.

This deponent further says, that immediately after the death of said Calvin Cornell, the said Orin C. Wood, who was present at his death, immediately left the State of Michigan and returned to said Wellington, in said Province of Canada, where he has since resided. And further this deponent saith not.

(Signed.) JORDAN CORNELL.

Subscribed and sworn to before me, the undersigned, Clerk of the Circuit Court for the county of Wayne, this twenty-sixth day of May, A. D. 1857.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, [L. S.] at the city of Detroit, in said county, the day and year aforesaid.

(Signed.) ENOS T. THROOP,

Clerk of the Circuit Court for the Co. of Wayne, Mich.

—

COPY OF INDICTMENT.

State of Michigan, Wayne County, ss.

The Circuit Court for the County of Wayne, of the May term thereof, in the year of our Lord one thousand eight hundred and fifty-seven.

The *grand jurors* of the people of the State of Michigan, inquiring in and for the body of the county aforesaid, upon

their oath present, that Orin C. Wood, late of the county aforesaid, on the first day of October, in the year of our Lord one thousand eight hundred and fifty-six, at the city of Detroit, in the county aforesaid, and within the jurisdiction of this court, did then and there willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder one Calvin Cornell, late of the said county, in the peace of God and the people of the State of Michigan then and there being, contrary to the form of statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

(Signed) J. KNOX GAVIN,
Prosecuting Attorney of Wayne Co., Mich.

(Endorsed)—A true bill.

(Signed) A. C. CANIFF, *Foreman.*

State of Michigan, Wayne County, ss.

I, Enos T. Throop, do hereby certify, that I am Clerk of the Circuit Court for the county of Wayne—that I have carefully compared the within and foregoing copy of Indictment with the original on file in said Circuit Court and in my custody, and that the same is a true transcript and copy of said original, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, [L. S.] on this twenty-seventh day of May, A. D. eighteen hundred and fifty-seven, at Detroit.

(Signed) ENOS T. THROOP,
Clerk.

NO. 3.

STATE OF MICHIGAN.

EXECUTIVE DEPARTMENT, June 10, 1857.

To all whom these presents shall come, GREETING:

It having been made known to me, Kinsley S. Bingham, Governor of Michigan, that the grand jury of the county

of Wayne, at the present June term of the Circuit Court for said county, found and presented to said Court a bill of indictment against Orin C. Wood, charging said Wood with the crime of having willfully, feloniously, and of his malice aforethought, killed and murdered one Calvin Cornell, at Detroit, in said county, on the first day of October, in the year of our Lord one thousand eight hundred and fifty-six; and that said Orin C. Wood has sought an asylum, and is now within the Province of Canada, part of the territories and dominions of the Queen of Great Britain; and it having been further made known to me that a requisition has been made by the government of the United States upon the government of her Britannic Majesty, for the delivery of the said Orin C. Wood to Frederick F. Egglinton of the city of Detroit, or to any other person duly authorized by the authorities of this State to receive the said Orin C. Wood, and to bring him to the United States for trial upon said bill of indictment;

Know ye, that I, the said Kinsley S. Bingham, Governor as aforesaid, have made, constituted and appointed, and do by these presents make, constitute and appoint the said Frederick F. Egglinton as the agent to receive said Orin C. Wood from the proper authorities of her Britannic Majesty in Canada, and fully authorize and empower him so to do, and to bring him, the said Orin C. Wood, and deliver him into the custody of the Sheriff of the said county of Wayne, to answer to said indictment, and on occasion thereof to be dealt with as law and justice shall require.

In testimony whereof, I have hereunto set
[L. S.] my hand and caused the great seal of the State of Michigan to be affixed, at Lansing, the tenth day of June, A. D. 1857.

By the Governor.

(Signed) KINSLEY S. BINGHAM.

(Signed)—E. A. THOMPSON,

6 *Dep. Secretary of State.*

NO. 4.

ATTORNEY GENERAL'S OFFICE,
Detroit, May 27, 1857.

SIR—The grand jury of this (Wayne) county have indicted Orin C. Wood for the murder of Calvin Cornell in this city, on the 1st October last. The means are not set forth in the indictment, as we have what is called the "Lord Denman Act" in this State.

The evidence before the grand jury left no doubt upon their minds. It was very cogent.

I have sent the necessary papers to Washington for the purpose of procuring a requisition under the Ashburton treaty (of 1842) for the surrender of Wood, and his removal to this State for trial. I shall not receive an answer for eight or ten days, but have no doubt of the speedy arrival of the requisition.

I am unacquainted with the laws of Canada touching the requisition, and must, of course, rely upon you in this regard.

Meanwhile I beg to assure you that no effort shall be omitted on my part to bring Wood to justice.

I have the honor to be, &c.,

J. M. HOWARD,
Attorney General.

HON. JOHN MACDONALD, *Attorney General,*
Toronto, C. W.

NO. 5.

DEPATMENT OF STATE,
Washington, 1st June, 1857.

J. M. HOWARD, ESQ., *Detroit, Michigan:*

SIR—I have to acknowledge the receipt of your communication of the 27th ultimo, and to state in reply, that a requisition has this day been made, by the government of the United States, through the British Minister in this city, upon the government of her Britannic Majesty, for

the delivery of Orin C. Wood, a fugitive from the justice of the United States, in Canada, to Frederick F. Egglinton or to any other person duly authorized by the authorities of Michigan to receive the said fugitive and bring him back to the United States for trial.

I am, Sir, your ob't servant,

(Signed) JOHN APPLETON,
Acting Secretary.

NO. 6.

ATTORNEY GENERAL'S OFFICE,
Detroit, June 9, 1857.

SIR—I have the honor to acknowledge the receipt of your telegraphic dispatch in answer to mine of yesterday. From the fact that I had on the 6th inst., received a letter from the Secretary of State of the United States, dated Washington, June 1st, advising me that on that day a requisition had been made through the British Minister at Washington, upon the government of her Britannic Majesty, for the delivery of Orin C. Wood, to an agent therein named, to be transferred to the authorities of this State for trial, I was led to presume that the Governor of Canada had, at the date of my dispatch, received the requisition.

He will doubtless be in receipt of it in a few days, and I shall feel particularly obliged if you will give me early intelligence of the fact, should your official relations permit it; so that I may, without loss of time, send the agent who is to bring the accused to this city. A telegraphic dispatch will he quite sufficient.

The agent will of course bring a letter from me.

I have the honor, to be,

Very respectfully, your ob't serv't,

JACOB M. HOWARD,
Attorney General.

HON. HENRY SMITH,
Solicitor Gen'l, Toronto, C. W.

NO. 7.

OFFICE OF ATTORNEY GENERAL, U. C.,
Toronto, 11*th June*, 1857.

SIR—The Solicitor General of Upper Canada, who has now left Toronto, the seat of government, before leaving, handed to me your letter of the 9th instant, in relation to the extradition of Orin C. Wood. The requisition from the government of the United States was received by our government only on 8th instant, subsequent to the date of the Solicitor General's telegraph to you. It is impossible for this government, upon the requisition *merely*, to order the surrender of O. C. Wood. He is now at large and must be arrested. To authorize his arrest it will be necessary for you, in case there are any original depositions in your State, to send by a special messenger, who can identify Wood, copies of such depositions, certified under the hand of the person having the legal custody of the original papers. The messenger producing the certified copies must be also able, upon his oath, to attest the correctness of the copies from having himself compared them with the originals. If no depositions exist in Michigan, then you must send the next best evidence of criminality that is in your power. The bare production of a true bill found by a jury of your State, would not of itself be sufficient. There must be the evidence upon which the bill was found.

Upon production of the evidence by your messenger, before a magistrate of the county in which Wood resides, it will be for the magistrate, if in his opinion the evidence is sufficient to establish the crime of murder, according to our laws, to commit the offender to custody. The magistrate then certifies to the government the evidence upon which he issued his warrant of commitment, *thereupon* the government take the matter in hand, and, if satisfied of the correctness of the proceedings, issue a warrant for the surrender of the fugitive. Our laws with respect to the

surrender of fugitives from justice, much resemble your Congress act of August 12, 1848. If you will consult your statute according to its provisions, you will in all probability be right according to our laws.

I have the honor to be, sir,

Your most obedient servant,

(Signed) ROBERT A. HARRISON.

Hon. JACOB M. HOWARD,

Attorney General, Detroit.

NO. 8.

ATTORNEY GENERAL'S OFFICE, MICH.,
Detroit, June 13th, 1857.

SIR—Your letter dated "Office of Attorney General, Upper Canada, Toronto, 11th June, 1857," is at hand.

In my communications to Mr. Smith, the Solicitor General, I deemed it unnecessary to indicate what evidence of criminality I should produce to the British authorities to sustain the charge of murder against Orin C. Wood; although I entertained the presumption that a duly authenticated copy of the indictment found against him, and of record here, would of itself be such evidence of criminality as would, in the language of the 10th article of the treaty of Washington, "justify his apprehension and commitment for trial, if the crime or offense had there (in Canada) been committed."

Such authenticated copy should of course be presented to the Judge or Magistrate before whom the accused is brought for examination, and such examination could only be had after the making of the complaint and the issuing of the warrant of arrest, as contemplated by the treaty. I speak with respectful deference to your opinion, but beg to say that in the absence of fraud or collusion in its procurement, such an indictment ought in my judgment to be deemed, under the treaty, sufficient evidence of criminality

to justify the executive authority on whom the requisition is made to surrender the person charged; for, as the common law prevails in Canada, (as it does in Michigan,) the finding and presentment of the indictment would, as I suppose, warrant the immediate apprehension of the accused, and his commitment for trial. If this efficacy is to be denied to indictment regularly found within the respective jurisdictions, it is easy to see that in many cases the treaty will become, by a construction which seems to me incompatible in its terms, illusory and useless. Yet your letter asserts that "the bare production of a true bill by a jury of this State would not of itself be sufficient; there must be the evidence upon which the bill was found;" and refer me to the act of Congress of 1848, as containing probably all that is required by the British statutes on the subject. Although quite familiar with that act, I am not aware that the American authorities have ever given to it, or to the treaty of 1842, such an interpretation as would make a British indictment a mere nullity as evidence of criminality.

You will see at once the impossibility of a compliance with the terms your letter suggests, for there had been no preliminary complaint against Wood, and no examination of witnesses before a Magistrate; but the grand jury, after being duly summoned and sworn, proceeded to the inquest, which resulted in the finding of a true bill; and far the most important part of the evidence presented to them was from witnesses present and testifying orally. The inquest was patient and thorough, but the evidence proceeding from numerous witnesses was of that circumstantial character whose effect is totally destroyed by the absence of a single witness, or the omission of a single circumstance.

It would, I think, be vain to expect the prosecution to produce before a Canada Magistrate the amount of proof they produced here. The task is perfectly hopeless; and

if he is to rejudge the evidence produced before the grand jury, as upon your construction of the treaty he would have a right to do, the thing may as well be given up and the man be allowed to remain in Canada; although it is certain that if thus charged in the province he would at once be apprehended and committed for trial. I hope, however, upon a review of the subject, that the Executive of Canada may see cause to surrender Wood without imposing terms with which it is impossible to comply.

As the authorities of this State act in the matter subordinately to the federal government, my duty, for the present, will be performed when I have made known its present posture to the proper department at Washington.

I have the honor to be,

Very respectfully,

Your obedient servant,

J. M. HOWARD,

Attorney General.

HON. ROB'T A. HARRISON, *Toronto, C. W.*

NO. 9.

ATTORNEY GENERAL'S OFFICE,
Detroit, June 13, 1857.

SIR—I had the honor to receive the letter of Mr. Appleton, Acting Secretary of State, dated the 1st inst., advising that a requisition for the surrender of Orin C. Wood, charged by indictment found here, with the murder of Calvin Cornell, had been made through the British Minister at Washington, upon the government of her Britannic Majesty. I at once communicated that fact to the Solicitor General of Canada, with a request that he would be kind enough, when the requisition should arrive, to advise me of the fact so that I might take the necessary steps for the extradition of the accused by the British authorities.

In answer to my note (dated 9th inst.,) to the Solicitor Gen'l,

I received from Mr. Harrison the original letter of which the enclosed (marked A.) is a copy. Deeming the grounds taken to be very embarrassing, to say the least, to the efficient operation of the 10th article of the treaty of Washington, and feeling an anxiety to bring Wood to justice for the heinous crime with which he is charged, I felt that the circumstances of the case would justify me, without waiting for a reference to you, in replying to Mr. Harrison's note. This I have done under this date, and have the honor to enclose you a copy of my reply, (marked B.)

It is with hesitation that I have ventured to dissent from the views of Mr. Harrison as to the effect, under the treaty, of an American indictment when presented as evidence of criminality; for I am quite aware that this effect may become a subject of discussion between the two governments, and must in the end be settled by their respective Courts; and I have felt it a duty thus early to enable the proper department to give the question its attention,—if it has not been authoritatively settled, of which I am not aware.

Should the Provincial government insist upon the practical construction of the treaty indicated in Mr. Harrison's letter, my own knowledge of the circumstances enables and requires me to say that it will utterly defeat the ends of justice in the present case.

It was my intention to forward to Canada, an authenticated copy of the indictment as evidence of criminality, to be used before the judge or magistrate, on the arrest and examination of Wood, prior to his surrender upon the requisition; and for the purpose of arresting him, to have caused to be made such a complaint as the laws of Canada should require; but if Mr. Harrison's view of the effect of the indictment is to be insisted on, I must of necessity abandon all further attempts, for they will be abortive.

Attached to the copy of indictment inclosed in my letter to the Secretary of State of the 27th ult., was an original

affidavit of *Jordan Cornell*, charging Wood with the murder of his father. May I ask whether that affidavit or a copy has been transmitted to the Governor of Canada? If so, I may possibly make it available without applying to young Cornell for another, which would be inconvenient as I do not know where at this time he is to be found.

I have the honor to be,

Very respectfully,

Your ob't servant,

J. M. HOWARD,

Attorney General.

Hon. LEWIS CASS,

Secretary of State, Washington.

NO. 10.

ATTORNEY GENERAL'S OFFICE,
Detroit, June 17, 1857.

SIR—I have this day received from Mr. Jordan Cornell, the son of the deceased person charged to have been murdered by Orin C. Wood, two telegraphic despatches, of which the following are copies:

"June 16, 1857.

"By telegraph from Toronto.

To J. M. HOWARD, *Attorney General, &c.:*

Wood left Wellington last Saturday. I telegraphed from Wellington. Please send me an answer.

(Signed) JORDAN CORNELL."

"June 17, 1857.

"By telegraph from Toronto.

To J. M. HOWARD, *Attorney General, Detroit:*

Dr. Wood has made his escape. Left on Saturday last.

(Signed) JORDAN CORNELL."

I am not informed to what place Wood has fled, and am apprehensive that the delay occasioned by the strange view entertained by the Canadian Government respecting

the construction of the 10th article of the treaty, will result, if they have not already resulted, in a complete failure of justice in his case. It was, as I have said, one of *poisoning*, by which Wood was enabled to rob his victim of about $3,000 at one of the first hotels in this city. A construction such as the provincial government insists upon, requiring me to lay before the Canada Magistrate the evidence upon which the indictment was found, appears to me to be the merest evasion of the treaty.

I have the honor to be,

Your obedient servant,

(Signed) J. M. HOWARD,
Attorney General.

HON. LEWIS CASS, *Secretary of State,*
Washington, D. C.

NO. 11.

DEPARTMENT OF STATE,
Washington, 22d June, 1857.

J. M. HOWARD, ESQ., *Attorney General of the State of Michigan, Detroit:*

SIR—Your letters of the 13th and 17th instant have been received. In reply, I beg leave to inform you that the insufficiency of an indictment under the 10th article of the treaty of Washington as proof of criminality against a party claimed as a fugitive from justice in Great Britain, has heretofore been maintained by the imperial government, under the act of Parliament for carrying the treaty into effect. The Department understands, from a note of Lord Napier of the 20th instant, referring to the case of Wood, that the Canadian authorities takes the same position under the Act of Parliament of that province, entitled XII Vict., Cap XIX.

Mr. Everett, when United States Minister in England, *was instructed to maintain the sufficiency of an indictment,*

and he accordingly addressed a note to Lord Aberdeen to this effect, requesting that the act of Parliament might be altered accordingly. That change, however, has never been made, nor can it be ascertained that the subject has since been pursued. The escape of Wood is to be regretted. If, however, he should be recovered, you may be able to proceed against him according to the Canadian statute. With that view, the original deposition of Jordan Cornell, with the annexed copy of the indictment against Wood, which accompanied your letter to the Department of the 27th ultimo, is herewith returned, attested transcripts of them having been retained.

I am, sir, your obedient servant,

(Signed) JOHN APPLETON,
Acting Secretary.

NO. 12.

ATTORNEY GENERAL'S OFFICE,
Detroit, Dec. 21, 1857.

SIR—I had the honor to address you on the 13th and 17th June last, respecting the case of a Dr. Orin C. Wood who had been indicted by the grand jury of Wayne county, in this State, for the murder by poison of one Calvin Cornell, at Detroit, in October, 1856, and who fled to Canada. It seems that the Provincial authorities hold an American indictment to be insufficient evidence of criminality under the treaty of '42, to authorize the arrest of a fugitive from the United States; and the result has been in this case that the accused is still at large, it being impossible for me to produce before a Canada Judge, all the testimony, positive and circumstantial, upon which the indictment was found by a *unanimous* grand jury.

I have quite recently been informed by the administrator of the deceased, that Wood has passed a note of hand for $1,350 purporting to have been signed by Cornell, and

which the administrator pronounces to be a *forgery*, although in a suit against the estate the holder, upon Wood's testimony, recovered a verdict in the Provincial Court. This note, taken in connection with other facts in my possession, confirms my conviction that Wood is guilty of the triple crime of murder, larceny and forgery; and I feel constrained again to call your attention to his case. It seems to me that the treaty is of little value if it is to be thus frittered away by exparte legislative provisions. Certainly in the present case the British construction operates as a complete protection to the accused.

I have the honor to be,
Your obedient servant,
(Signed) J. M. HOWARD,
Attorney General.

HON. LEWIS CASS,
Secretary of State, Washington, D. C.

NO. 13.

DEPARTMENT OF STATE,
Washington, 24th Dec., 1857.

J. M. HOWARD, Esq., *Detroit, Michigan:*

SIR—I have to acknowledge the receipt of your letter of the 21st instant, in which my attention is again called to the case of Orin C. Wood, a fugitive from the justice of the United States in Canada.

As the difficulty experienced in this case seems to have arisen from ignorance of the Canadian law on the subject, I herewith transmit to you two printed copies of the Canadian act for better giving effect to the tenth article of the treaty between the United States and Great Britain, of the 9th of August, 1842, which *act does not materially differ from the act of Congress for giving effect to certain treaty stipulations between the United States and foreign governments, for the apprehension and delivery of certain offend-*

ers, and which will enable the pursuing parties, in this instance, to act understandingly in the matter.

I am, sir, your ob't servant,

(Signed) LEWIS CASS.

NO. 14, enclosed in No. 13.

CANADIAN ACT—XII VICT., CAP. XIX.

CAP. XIX.

AN ACT for better giving effect, within this province, to a treaty between her Majesty and the United States of America, for the apprehension and surrender of certain Offenders. [May 30, 1849.]

Whereas, By the tenth article of a treaty between Her Majesty and the United States of America, signed at Washington, on the ninth day of August, in the year one thousand eight hundred and forty-two, the ratifications whereof were exchanged at London, on the thirtieth day of October, in the same year, it was agreed that Her Majesty and the said United States should, upon mutual requisition by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other: *Provided*, That this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed; and that the respective Judges and other Magistrates of the two governments should have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the appre-

hension of the fugitive or person so charged, so that he might be brought before such Judges or other Magistrates respectively, to the end that the evidence of criminality might be heard and considered, and if on such hearing the evidence should be deemed sufficient to sustain the charge, it should be the duty of the examining Judge or Magistrate to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive, and that the expense of such apprehension and delivery should be borne and defrayed by the party making the requisition and receiving the fugitive; and it is by the eleventh article of the said treaty further agreed, that the tenth article hereinbefore recited should be continued in force until one or other of the high contracting parties should signify its wish to terminate it, and no longer: *And whereas*, Certain provisions of the act passed by the Parliament of the United Kingdom of Great Britain and Ireland, in the session held in the sixth and seventh years of Her Majesty's reign, for giving effect to the treaty aforesaid, and entitled *An act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders*, have been found inconvenient in practice in this Province, and more especially that provision which requires that, before any such offender as aforesaid shall be arrested, a warrant shall issue under the hand and seal of the person administering the government, to signify that such requisition as aforesaid hath been made by the authority of the United States for the delivery of such offender as aforesaid, and to require all justices of the Peace, and other magistrates and officers of justice, within their several jurisdictions, to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to jail for the purpose of being delivered up to justice according to the provisions of said treaty, inasmuch as by the delay occasioned by compliance with said provision, an offender may have

time afforded him for eluding pursuit: *And whereas*, by the fifth section of said act it is enacted, that if, by any law or ordinance to be thereafter made by the local legislature of any British colony or possession abroad, provision shall be made for carrying into complete effect within such colony or possession, the objects of said act, by the substitution of some other enactment in lieu thereof, then it shall be competent to Her Majesty, with the advice of Her Privy Council, (if to Her Majesty in Council it shall seem meet, but not otherwise,) to suspend the operation within any such colony or possession of the said act of the said Imperial Parliament, so long as such substituted enactment shall continue in force there, and no longer: *And whereas*, it is expedient to make provision for carrying the objects of the said act and treaty into complete effect within this Province, by the substitution of other enactments in lieu of the said Imperial act.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an act passed in the Parliament of the United Kingdom of Great Britain and Ireland and entitled *An act to re-unite the Provinces of Upper and Lower Canada*, and for the government of Canada; and it is hereby enacted by the authority of the same, that it shall be lawful for any of the judges of any of Her Majesty's Superior Courts in this Province, or for any of Her Majesty's justices of the peace in the same, and they are hereby severally vested with power, jurisdiction, and authority, upon complaint, made under oath or affirmation, charging any person found within the limits of this Province with having committed, within the jurisdiction of the United States of America, or of any such States, any of the crimes enumerated or provided for by the said treaty, to issue his warrant for the apprehension of the person so

charged, that he may be brought before such judge or such justice of the peace, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this Province, if the offence alleged had been committed therein, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Governor or Lieutenant Governor of this Province, or to the person administering the government of the same for the time being, that a warrant may issue, upon the requisition of the proper authorities of the said United States, or of any of such States, for the surrender of such person according to the stipulations of the said treaty; and it shall be the duty of the said judge or of the said justice of the peace, to issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made, or until such person shall be discharged according to law.

II. Provided always, and be it enacted, That in every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any of the said United States may have been granted, certified under the hand of the person or persons issuing such warrant, or under the hand of the officer or person having the legal custody thereof, and attested upon the oath of the party producing them, to be the true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended.

III. And be it enacted, That it shall be lawful for the Governor or Lieutenant Governor of this Province, or the person administering the government of the same for the time being, upon a requisition made as aforesaid by the authority of the said United States, or of any of such States, by warrant under his hand and seal, to order the person

so committed to be delivered to such person or persons as shall be authorized in the name and on the behalf of the said United States, or of any of such States, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person or persons, authorized as aforesaid, to hold such person in custody, and to take him or her to the territories of the said United States pursuant to the said treaty; and if the person so accused shall escape out of any custody to which he or she shall be committed, or to which he or she shall be delivered as aforesaid, it shall be lawful to retake such person, in the same manner as any person accused of any crime against the laws of this Province may be retaken upon an escape.

IV. And be it enacted, That when any person who shall have been committed under this act and the treaty aforesaid, to remain until delivered up in pursuance of a requisition as aforesaid, shall not be delivered up pursuant thereto, and conveyed out of this Province within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he or she may have b en committed, by the readiest way out of this Province, it shall in every such case be lawful for any of the ju ges of Her Majesty Superior Courts in this Province, having power to grant a writ of *habeas corpus*, upon application made to him or them by or on behalf of the person so committed, and upon proof made to him or them that reasonable notice of the intention to make such application has given been to the Provincial Secretary, to order the person so committed to be discharged out of custody, unless sufficient cause shall be shown to such judge or judges why such discharge shall not be ordered.

V. And be it enacted, That this act shall come into force upon the day to be appointed for that purpose in any proclamation to be issued by the Governor, Lieutenant Gov-

ernor, or person administering the government of this Province, for the purpose of promulgating any order of Her Majesty, with the advice of her Privy Council, suspending the operation of the Imperial Act hereinbefore cited, within this Province, and not before, and shall thereafter continue in force during the continuance of the tenth article of the said treaty and no longer.

(Signed) C. A. P.

NO. 15.

THE FOLLOWING IS A STATEMENT OF THE FACTS FOUND BY THE JUDGE WHO TRIED SAID CAUSE, AND OF HIS CONCLUSIONS OF LAW.

FACTS FOUND BY THE JUDGE.

The President and Directors of the Phenix Bank, (commonly called The Phenix Bank,) was a banking corporation located in the city of New York; and was incorporated by an act of the Legislature of the State of New York, and was by such act (and acts amending the same,) vested with power and authority to transact and carry on banking business, and did transact and carry on banking business from and after the passage of the act of February 2, 1831, (Laws of 1831, p. 28,) until the first of January, 1854.

John Delafield was President of said Bank during all the first part of the period last named, and until in 1839 or 1840, when he resigned, and Thomas Tileston was elected President of, and continued to be President of said Bank, until its charter expired, which was on or about the last day of December, 1853.

The State of Michigan, (the plaintiffs,) by the Legislature of said State, passed an act in 1837, which was duly approved by the Governor of said State, on the 21st of March, 1837, which act reads thus, viz:

(*Here the Judge inserts a copy of the Five Million Loan Act of* 1837: *to be found in the Sess. Laws of* 1837, *page* 152.)

Under the authority of last said act, *Stevens T. Mason, Esq.*, (being at the time Governor of the State of Michigan,) by a written letter of attorney, signed by him, bearing date at Detroit in said State, on the first of May, 1837, selected and authorized said John Delafield, President of said Phenix Bank, (and which letter of attorney was received by said Delafield, within twenty days after its date,) in the name of him, the said Governor, to carry into effect the provisions of said act, by negotiating a loan or loans to said State, and on such terms as might be most advantageous to said State. The said letter of attorney reads as follows:

EXECUTIVE DEPARTMENT,
Detroit, May 1, 1837.

SIR—By an act of the Legislature of the State of Michigan, approved March 21st, 1837, the Governor is authorized and directed in the name and on behalf of the people of the said State, to negotiate and agree for a loan or loans, not exceeding in *the whole* five millions of dollars. Under the authority in me vested by this law, I have selected and do hereby empower you, in my name, to carry into effect its provisions by negotiating a loan on such terms as may be most advantageous to the State, keeping in view the limitations and restrictions of the act under which you were appointed.

The fund which you are hereby authorized to raise, is to be applied by the State of Michigan to the purposes of internal improvement, and it is desirable that the negotiation should be contracted by instalments not exceeding one million of dollars annually, until the entire loan is taken up. This annual instalment may be made a half-yearly payment, if it would facilitate the negotiation, or at such other periods as may be by you found most advantageous.

The details, however, of any contract you may enter into must necessarily *be left to your discretion*, to be regulated by circumstances which may arise in the progress of

your negotiation. But whilst it is expected that you will, as the representative of the interests of the State of Michigan, negotiate her loan upon the most advantageous terms in your power, the public are hereby solemnly assured that any contract entered into by you, will receive my sanction and confirmation, provided it does not exceed the power conferred upon you by the law from which you derive your appointment, and which has been transmitted to you.

Very respectfully,
Your obedient servant,
STEVENS T. MASON,
Gov. of Michigan.

JOHN DELAFIELD, Esq., *city of New York.*

The said Governor, at the date of said letter of attorney, had caused a copy of said act to be delivered to said Delafield, and the latter, before the 20th of February, 1838, had full knowledge of the contents thereof. The Legislature of the State of Michigan passed another act, approved on the 15th of November, 1837, which reads as follows, viz:

(*Here the Judge inserted a copy of the Act amendatory of the Loan Act, to be found in the Session Laws of* 1838, *p.* 3.)

Said Delafield, on receipt of said letter of attorney, assumed and undertook to execute the trusts and perform the duties thereby conferred upon him. Thereafter, and before the first of January, 1838, the said Governor delivered to said Delafield as such attorney, bonds to the amount of $1,000,000, drawn and made as authorized, by and for the purposes prescribed by said Act, to be sold by said Delafield as such attorney.

By an Act of the Legislature of the State of Michigan, approved March 26th, 1835, a banking corporation was created under the name of the "President, Directors and Company of the Michigan State Bank," which was located

at Detroit aforesaid, and possessed the usual ordinary powers and privileges of a banking corporation, and as such acted and transacted business for at least five years after the first day of January, 1838. John Norton, Jr., was cashier of said Bank, and acted as such during the years 1838 and 1839, and was also the Fiscal Agent of the Legislature of said State, appointed by a joint resolution of said Legislature, passed January 10th, 1837, and which is in the words following, viz:

"*Resolved, by the Senate and House of Representatives of the State of Michigan*, That John Norton Junior, cashier of the Michigan State Bank, be, and he is hereby appointed Fiscal Agent of the Legislature."

Before the 20th of February, 1838, said Norton, as such Cashier, became the holder of a bill of exchange drawn by said S. T. Mason, as such Governor, in favor of said Michigan State Bank on said Delafield, dated prior to the 20th of February, 1838, for the sum of $90,000, which draft, prior to the day last named, had been presented for acceptance and payment, and had been duly protested for non-payment. After it was so protested, said Norton in January or February, 1838, went from Detroit to New York, and applied to said Delafield for payment of said drafts.

While said Norton was so as aforesaid in New York, Governor Mason wrote, and sent through said Norton, to said Delafield, a letter, which letter Norton delivered to Delafield before the 13th of March, 1838, which letter reads thus:

"DETROIT, Feb. 24th, 1838.

DEAR SIR—In a conversation with Mr. Norton, the evening before his departure, he suggested that he would like, in addition to his $90,000 due on my draft, to command some additional funds to purchase and redeem Michigan notes in your market. Mr. Norton is a particular personal friend of mine, and is the Fiscal Agent of the State, and

Cashier of the State Deposit Bank. You therefore, may, if you have received funds on the bonds in your possession, transfer to Mr. Norton, $50,000 (or) $100,000, taking his certificate of deposit from 'John Norton, Jr., Cashier of the Michigan State Bank,' which will be cashed at the State Deposit Bank. This letter is enclosed to Mr. Norton, who will deliver it to you.

Respectfully,

(Signed) S. T. MASON.

JOHN DELAFIELD, Esq."

The said Phenix Bank and said Delafield had notice of said letter, and of the contents thereof, before the 13th day of March, 1838. On or about the 13th day of March, 1838, the said Phenix Bank, at the request of said Delafield and of said Norton as such Cashier, drew and delivered to said Norton two drafts or bills of exchange, each dated March 13th, 1838, and each drawn payable to the order of John Norton, Jr., as such Cashier; one was for the sum of $8,500, and was drawn on the "Farmers and Mechanics' Bank, a banking corporation located at, and doing business as such at Detroit aforesaid. The other was for the sum of $7,900, and was drawn on the "Bank of the River Raisin," a banking corporation located at, and doing business as such at Monroe, in said State of Michigan. Each of said two corporations last named, was created by and under a statute of the State of Michigan, duly passed and approved.

N. G. Ogden was Cashier of said Phenix Bank when last said two drafts were drawn; they were drawn by him as such Cashier; they were delivered by him to said Norton in a letter addressed to the latter by said Ogden as such Cashier, and said Norton as such Cashier, on receipt of said letter, and of the two said drafts then being therein, signed a written admission of the receipt thereof, which letter and admission read thus:

"PHENIX BANK,
New York, 13th March, 1838.

J. NORTON, Esq., *Cashier:*

DEAR SIR—Please receive herein my draft on Farmers and Mechanics' Bank, Detroit,..... $8,500
do Bank of River Raisin, Monroe,..... 7,900

$16,400

On account of advance made by this Bank on Michigan bonds, deposited with John Delafield, Esq., President.

Respectfully yours,
(Signed) N. G. OGDEN."

"Received of the Phenix Bank the above letter.
JOHN NORTON, JR.,
Cashier."

When last said two drafts were delivered to said Norton and received by him, said Delafield had not received any funds upon the bonds so entrusted to him to be sold as aforesaid; which *fact* was known to the said Phenix Bank.

Prior to the 13th day of March, 1838, John Delafield, as such agent, with the knowledge and approbation of Governor Mason, had made arrangements with James J. King, of the house of Prime, Ward & King, of New York city, to go to Europe, and who did, in consequence thereof, go to Europe, to negotiate in behalf of the State of Michigan, a sale of all the bonds issued and to be issued under said acts; and to procure advances to be made to said State to the amount of $150,000 pending said negotiations, and to be made by the first of February, 1838, by the same being paid into said Phenix Bank for said State, and it was in anticipation of such advances being made, that the aforesaid draft of $90,000 was drawn.

When the drafts for $8,500 and $7,900 were advanced to Norton as aforesaid, the sum so advanced was charged

on the books of the Phenix Bank to "J. Delafield, agent for the State of Michigan."

After the aforesaid draft for $90,000, and another draft for $60,000, drawn by Governor Mason, in anticipation of the sale of said State bonds being effected, and of such advance of $150,000 being procured, had been protested, said Delafield, while said Norton was so as aforesaid in New York, and at the request of Governor Mason, procured an advance to be made by Prime, Ward & King, of $150,000, for and on account of the State of Michigan, which moneys so advanced were used to take up said protested drafts; said James J. King, by reason of some of said State bonds having been sold in the United States, by authority of Governor Mason, broke off his negotiations in Europe aforesaid, and declined to act further therein; and on or about the fourth of June, 1838, Governor Mason concluded an arrangement with the Morris Canal and Banking Company, by which the latter company was to negotiate for the State of Michigan the sale of said State bonds, and was to refund to Prime, Ward & King the $150,000 which they had advanced as aforesaid, on receiving the bonds which had been entrusted to said Delafield for sale.

Governor Mason being then in the city of New York, engaged in consummating the said arrangements, and with a view thereto, addressed to said Delafield, on the 4th of June, 1838, a note in writing in the following words:

MORRIS CANAL OFFICE,
New York, June 4th, 1838.

JOHN DELAFIELD, Esq.:

SIR—You will deliver to Theodore Romeyn, Esq., the whole amount of Michigan bonds in your possession, (say twelve hundred thousand dollars at 6 per cent. stock.) Mr. Romeyn will hand you the amount of Prime, Ward & King's charge, and account for advances to the State.

Respectfully,

Your obt. servt.,

STEVENS T. MASON.

The said Delafield at this time requested that the $16,400 alleged to have been advanced on behalf of the State of Michigan to Norton, on the 13th of March, 1838, should also be then refunded.

Governor Mason, in answer to this request and claim, wrote a note to said Delafield, in the words following, viz:

"NEW YORK, June 4th, 1838.

SIR—John Norton, Esq., having received from you two drafts, one on the Farmers and Mechanics' Bank, of Detroit, for $8,500, and the other on the River Raisin Bank, for $7,900, in adjusting our accounts it becomes important to state, that when I left home, according to my impression, those drafts were not collected; but so soon as I learn that such is the case, I will cause the account to be remitted to you.

Respectfully,

S. T. MASON.

JOHN DELAFIELD, Esq."

Upon the recept of said last letter, Mr. Delafield surrendered all of the said State bonds held by him as such agent as aforesaid, and Governor Mason then gave a receipt therefor, reading thus:

"Received, New York, June 4th, 1838, of John Delafield, Esq., the entire amount of Michigan State bonds, heretofore placed in his hands as agent.

S. T. MASON."

When the two drafts (viz: one for $8,500, and one for $7,900,) were delivered by the Phenix Bank to Norton as aforesaid, the Phenix Bank and Delafield believed that the advance would be recognized and treated by Gov. Mason as an advance made to the State of Michigan, and made said advance in actual good faith, believing that said Norton would pay to said State and on its behalf, the sum so advanced, and would be expected and required by Governor Mason so to do.

The Cashier of the Phenix Bank, by letters addressed to Gov. Mason—one dated November 20th, 1838; one dated March 22d, 1839; one dated May 13th, 1839; one dated the 15th day of July, 1839—urged him to give his attention to the matter of these two drafts, amounting to $16,400, and to remit the amount of said alleged advance and interest to said Phenix Bank. No reply was made to those letters, except that an interview took place between Gov. Mason and Mr. Ogden between the 15th day of May and the 15th day of July, 1839; of what was said in that interview, there is no direct evidence, except that the said letter of July 15th, 1839, affirms that Gov. Mason gave Mr. Ogden to understand, that the matter should receive the immediate attention of Governor Mason on his return to Detroit.

The said $8,500 draft was collected by Norton or the said Michigan State Bank, and the amount thereof was credited on the books of the latter to the Phenix Bank, on or about the 26th of October, 1838.

The draft for $7,900 was never paid to Norton by the River Raisin Bank, and the Phenix Bank, on ascertaining that fact, by a letter of its cashier, dated March 26th, 1840, addressed to the Cashier of the River Raisin Bank, (and received by the latter on the 2d, 3d, or said 4th of April, 1840,) said:

"If it—the draft for $7,900—has not been paid by you, you will please refuse payment of it, as we have never received value for it; and if not actually paid, prior to this notice, we shall look to you for the amount."

On the 10th of June, 1840, the said Phenix Bank employed Charles H. Stewart, Esq., a counsellor at law, residing at Detroit aforesaid, to take charge of, and present the claim of said bank against the State of Michigan, for the said $16,400, and the interest thereon, and authorized him to take all such measures as he might find expedient for procuring or securing payment thereof. Such employ-

ment was evidenced by a letter of that date, from the cashier of said bank to said Stewart, and by his written acceptance thereof, which letter and acceptance read as follows:

NEW YORK, June 10th, 1840.

TO CHARLES H. STEWART:

SIR—You are authorized, as agent for the Phenix Bank, to present to the State of Michigan, for payment, the claim of the bank for $16,400, advanced on the faith of the State Bonds, in March, 1838, to John Norton, as their agent, together with interest on the advance, and you will take all such measures as you may find expedient for procuring or securing the payment. You are also authorized to avail yourself of any proposition which may be made from any other quarter than the State, of securing the debt, or any part of it, provided that you do not act to release or weaken our claim on the State, who is our proper debtor. You may exercise your own discretion in compounding for the interest, and in taking any security offered by the State, and we agree to pay you for your services ten per cent. on the sum you shall recover or secure for us, provided, however, that if you fail altogether you shall have no charge whatever against us. We will furnish any evidence within our power on demand, and shall do no act to nullify your proceedings.

N. G. OGDEN,
Cash.

I agree to the terms above mentioned, and shall use my best efforts to advocate the claim of the Bank.

CHARLES H. STEWART.

Said Stewart, as such agent, submitted said claim to the then Auditor General of the State of Michigan, prior to the 29th of July, 1840. The said Michigan State Bank and the said River Baisin Bank, were then in a precarious condition, and their failure was regarded as highly probable, that said Stewart, and the said Auditor General,

deemed it for the interest of the said Phenix Bank, and of the State of Michigan, if the latter should be held liable for, or should assume to refund the advance so as aforesaid made to said Norton, that settlements should be made with such Banks by accepting from them the best securities they could be induced to give; to become eventually the property of the Phenix Bank, or of the State of Michigan, as the latter should or should not, or should admit its liability to the Phenix Bank and pay their said claim.

In order to furnish written evidence of this concurrence of views, and on the terms on which the said Auditor General assented to such a settlement and arrangement being made with said two Banks, the said Stewart addressed to said Auditor General, on the 29th of July, 1840, a letter in these words, viz:

DETROIT, July 29th, 1840.

HON. E. P. HASTINGS:

SIR—I have submitted to you a claim made by the Phenix Bank of New York, on the State, for $16,400, being for that amount advanced on the faith of the State bonds: the advance was made by drafts on the Farmers and Mechanics' Bank and Bank of the River Raisin handed to John Norton as fiscal agent. The draft on the first Bank was received and placed to the credit of the Phenix Bank by the Michigan State Bank, and that institution and the River Raisin Bank now admit their indebtedness and offer security. The debt belongs either to the State or the Phenix Bank, and the fact will be determined according to the view the next Legislature may take of the subject. You have no immediate power to settle the question, but your office makes you guardian and trustee of the State interests. I therefore submit to you whether it be not expedient to take such security as can be obtained for the benefit of the party ultimately entitled. It may not hereafter be forthcoming, and that such accept-

ance shall not be deemed to prejudice, or in any manner affect the ultimate settlement between the State and the Phenix Bank, which shall be made as if no such security had been taken, and that I be at liberty to accept such security as in my judgment is the best to be had; and shall hold the same as trustee, transferring it to the State, *in case they recognize their indebtedness, if not, then to the Phenix Bank;* and that I also shall be at liberty to compound the question of interest with the Banks, and any settlement with them be in full discharge of their indebtedness.

I am, sir,

Your most obedient servant,

CHAS. H. STEWART.

Said Auditor General, on the 22d of September, 1840, wrote at the foot of said letter of the 29th of July, 1840, as follows, viz:

Concurring in the views above suggested, I agree to the proposal suggested, but under the express understanding that by so doing I do not in any manner recognize the claim nor give it any validity or effect against the State more than it now has.

E. P. HASTINGS,
Aud'r Gen'l.

And then returned said letter to said Stewart.

Said Stewart, on the 23d of Sept., 1840, settled with said River Raisin Bank, and, on the 2d of October, 1840, with said Michigan State Bank, as hereinafter stated, having no authority from the Phenix Bank to make such settlement, except such as is conferred by said letter of June 10th, 1840, and by a letter dated August 4th, 1840, which last said letter read thus, viz:

PHENIX BANK,
New York, 4th August, 1840.

CHARLES H. STEWART, Esq., *Detroit:*

DEAR SIR—I have your favor of the 19th ult. You are hereby authorized to adopt all or any such measures with regard to our claim on the State of Michigan, as in your judgment shall seem right and proper, and best calculated for the security and ultimate recovery of the same.

My letter of instruction of 10th June last, was, as construed by you, intended to confer all those powers upon you as the sole agent for the Bank in this matter.

Respectfully yours,

N. G. OGDEN,
Cashier.

On the 23d of September, 1840, said Stewart settled with the said River Raisin Bank, and at that time exhibited and left with it, as his authority for making such settlement, the said letter of August 4th, 1840, and on and as such settlement, received the items of property next mentioned, and gave a receipt written under a description thereof, as follows, viz:

H. D. Mason, bond and mortgage judgment, March 23d, 1840,.....		$3,680 37
Six months' interest, to Sept. 23d, 1840,.....		110 25
H. Phillips' judgment, July 22d, 1839,.....		1,279 26
One year two months one day's interest, to September 23d, 1840,.....		87 74
Levi Beebee, note due Sept. 17th, 1838,.....		2,800 00
Two years and six days' interest, to September 23d, 1840,.....		395 00
Draft on the Michigan State Bank,.....		155 53
Balance due Phenix Bank,.....	$7,899 55	
Interest from 16th August, 1839,— one year, one month, seven days,— to 23d September, 1840,.....	616 60	
		$8,510 15

Received, September 23d, 1840, of the Bank of River Raisin, eight thousand five hundred and ten dollars and fifteen cents, as above, in full payment of their indebtedness to the Phenix Bank of New York, for moneys collected on their account.

CHAS. H. STEWART,
Attorney and agent for the Phenix Bank.

He also exhibited to such Bank, prior to said settlement, the said letter of June 10th, 1840, and said Bank not deeming that a sufficient authority for said Stewart to act in behalf of the Phenix Bank, in making such settlement, the said letter of August 4th, 1840, was procured, presented to, and left with said River Raisin Bank, as aforesaid.

On the 2d of October, 1840, the said Stewart settled with the Michigan State Bank, and thereupon executed a paper, (showing the terms of such settlement,) as follows, viz:

THE MICHIGAN STATE BANK, *Detroit*,
TO THE PHENIX BANK, N. Y., DR.

1838, March 13th.

For our draft on the Farmers and Mechanics' Bank, Detroit of this date,.....	$8,500 00
Interest on above, compromised by agreement,	500 00
Draft on River Raisin Bank on you, in favor of Charles H. Stewart, our agent,.....	155 53
	$9,155 53

Cr.

By Illinois and Michigan Canal scrip,.....	$500 00
By conveyance of 2,397.40 acres of land in Saginaw County, by agreement, in full,.....	8,655 53
	$9,155 53

Received the above in full discharge of the foregoing account.

CHARLES H. STEWART,
Att'y and Agent for the Phenix Bank, N. Y.

Detroit, Oct. 2d, 1840.

The said Michigan State Bank executed to said Stewart a deed, (as party of the first part thereto,) dated Oct. 2d, 1840, for the consideration (as expressed therein) of $8,500, and also of $155, by which it conveyed to said Stewart the said two thousand three hundred and ninety-seven acres and forty one-hundredths of an acre of land, (2,397.40,) "subject, however, to the taxes and charges now (then) due and assessed upon said lands, and in trust for the Phenix Bank of the city of New York, or for the Auditor General of the State of Michigan, whichever shall assume the debt thereby, settled by the party of the first part," the said Michigan State Bank. This deed was recorded on the 6th of October, 1840, in the proper county. When this settlement was concluded, said Stewart informed the said Auditor General of the terms of the settlement so as aforesaid made with that Bank, and so also of the one so as aforesaid made with the said River Raisin Bank.

Said Stewart, as agent of the Phenix Bank, presented said claim to the Legislature of the State of Michigan, at the sessions thereof, held in 1841, 1842, 1843, 1844, and 1845, and said Stewart stated to the committees of the said Legislature, to whom said claim was by said Legislatures referred, the settlements which he had so as aforesaid made with said River Raisin Bank, and the Michigan State Bank, and their nature, and argued that by virtue of those arrangements the State of Michigan would reap the benefit of the securities he held, in case the State satisfied the claim of the Phenix Bank.

The statement of the claim, as presented to the Legislature of Michigan, as aforesaid, in 1841, was in writing, and detailed the facts in which the claim had its origin, and stated that the draft on the Farmers and Mechanics' Bank was paid to Norton, and credited by him to the Phenix Bank, and not to the State, and that the draft on the River Raisin Bank was not collected by him, and also stated that the payment of the debt will not be a loss to the State, for

security is now held by a trustee from the Michigan State Bank and Bank of River Raisin, for both debts, which will be turned over to the State.

These banks were both insolvent; they were continually threatened with suits and injunctions and receivers; they were parting with their assets, and existed at the precarious forbearance of creditors; experience had shown that to pass a bank into a receiver's hands was equivalent to destruction, and it was deemed a matter of judicious precaution by the Phenix Bank, and by the Auditor General for the State, to secure good property while it could be had for the benefit of the ultimate creditors of these Banks.

The statement of said claim, presented to the Legislature in 1843, offered to compromise the claim, on the principle that the State should repay the draft actually paid to Mr. Norton, and in that event the Phenix Bank would "abide the other at their own risk, though by so doing', (as said statement declares) "they are turned over to a number of alleged securities, which, in the course of events, not here necessary to state, have taken the place of the River Raisin Bank, as debtor."

Beside the oral and written communication so made by Mr. Stewart, to the committees of the Legislature, to whom said claim was referred, he also informed Mr. Hastings, in 1840 and 1841, (he then being Auditor General of said State,) of these settlements, also Charles G. Hammond, his successor in that office, and Mr. Bell, in 1848, who was then Auditor General. He also in 1840, 1841 and 1842, informed Peter Moray (then Attorney General of said State) of said settlements, and Zepheniah Platt, his successor in that office.

Stewart, by a letter addressed to the Phenix Bank, dated February 10th, 1842, informed said Bank that he had then recently received $225 75, on one of the securities trans-

ferred to him on his said settlement with the River Raisin Bank.

Stewart, by a subsequent letter, addressed to said Phenix Bank, dated Nov. 9th, 1842, advises a change of some of the securities so as aforesaid taken from said River Raisin Bank, and remarks "will you please give me your wishes on the subject of converting your securities."

To this the said Phenix Bank replied by a letter to said Stewart, dated the 21st of that month, that we must leave it entirely with you to make such settlements, or change of securities, as you may deem, under all circumstances, to be most for our interest, not doubting that you will use a prudent discretion in all such matters.

Stewart, by the 30th of October, 1843, had collected, in all, from the said River Raisin Bank securities, about $2,000 over and above his expenses, and had substituted the residue of such securities for lands in the State of Michigan; and in and by a letter to the said Phenix Bank, dated on the day last named, informed said Bank "that the securities" (so far as aforesaid taken by him from said River Raisin Bank) "have all been converted into good lands in this State" (Michigan.)

Said Stewart left the State of Michigan in 1848, but did not cease to be connected with said claim as agent of the Phenix Bank, until the 5th of August, 1852.

By a deed, dated and delivered on the day last named, said Stewart conveyed to the Phenix Bank the lands which said Michigan State Bank had conveyed to Stewart by the deed of October 2d, 1840.

The actual motive of the Phenix Bank in taking said deed of August 5th, 1852, at the time it was taken, was to place itself in a condition to be able to transfer the property (thereby conveyed) to the State of Michigan, on the allowance and payment by the latter of the said claim of the Phenix Bank; such deed reads as follows, viz:

This indenture, made the fifth day of August, in the year of our Lord one thousand eight hundred and fifty-two, between Charles H. Stewart, formerly of Detroit, now of Washington City, of the first part, and the President, Directors, and Company of the Phenix Bank of the City of New York, of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensealing or delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to their heirs and assigns forever, all those certain pieces or parcels of land, situate, lying and being in the county of Saginaw and State of Michigan, known and described as follows, to wit: The east half northeast quarter, and west half southeast quarter, of section number 15, township ten north range two east, containing one hundred and sixty acres; the west half of northwest quarter of section number 14, township and range same as last aforesaid, containing eighty acres; the southeast quarter of section number 12, township and range same as last aforesaid, containing one hundred and sixty acres; the west half and southeast quarter of section number 11, township and range same as last aforesaid, containing four hundred and eighty acres; the north half of section number 10, township and range same as last aforesaid, containing three hundred and twenty acres; the northeast quarter of section number 9, township and range same as last aforesaid, containing one hundred and sixty acres; the east half of southeast quarter of section number 7, township ten, range three east, containing eighty acres; the northeast fractional part of northeast fractional quarter of section number 5, township and range

same as last aforesaid, containing ninety-seven 33-100ths acres; the north fractional part of northwest fractional quarter of section number 4, township and range same as last aforesaid, containing ninety-seven 4-100ths acres; the fractional section number 3, township ten north range two east, containing seven hundred and sixty-three 3-100ths acres; subject, however, to any tax, liens, or sales for taxes of any of the foregoing premises; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, their successors and assigns forever. And the said party of the first part, and his heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, their successors and assigns, against the said party of the first part, his heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same by, through, or under him, shall and will warrant, and by these presents forever defend, except as to tax liens and sales.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

CHAS. H. STEWART, [L. S.]

Sealed and delivered in presence of }

A. G. NORWOOD.

State of New York, City and County of New York, ss.

On the seventh day of August, eighteen hundred and fifty-two, before me came Charles H. Stewart, to me known to be the individual described in and who executed the within indenture, and acknowledged the same to be his act and deed.

A. G. NORWOOD,
Commissioner of Deeds.

The said Phenix Bank, on the same 5th of August, 1852, executed a deed of settlement and release between said Bank and said Stewart, which was also executed by said Stewart, and delivered on the day of its date, and reads thus, viz:

This agreement, made the fifth day of August, A. D. 1852, between the President, Directors and Company of the Phenix Bank of the city of New York, of the first part, and Charles H. Stewart, formerly of Detroit, but now of Washington City, of the second part, Witnesseth: Whereas, on the 10th day of June, A. D. 1840, the said Bank employed the party of the second part as its agent to prosecute a certain claim for $16,400 against the State of Michigan, with a contingent interest of ten, afterwards increased to twenty per cent., and certain powers to said agent; the said claim consisting of an advance by the Bank to John Norton, Junior, cashier of the State Bank of Michigan, for the State;

And whereas, the said advance was made by the order of the Phenix Bank on the Farmers and Mechanics' Bank and the Bank of River Raisin, the order on the first being paid, and the second unpaid;

And whereas, the party of the second part was subsequently authorized by the said Phenix Bank, and the Auditor General of the State of Michigan, to take any securities *in his discretion from either of the ultimate debtors in the matter*, and to hold the same for the Phenix Bank or the State of Michigan, whichever would assume the

debt. And pursuant thereto, the said party of the second part did subsequently take some securities from the said parties, and among them the land hereinafter mentioned, of all which, and of his proceedings in the matter, the party of the second part duly informed the said Phenix Bank from time to time, reference *being here made to his letters.* And whereas, the said Bank now desires the *cancelment of the interest and rights of the party of the second part, and possession of all the papers in the case, including those which were acquired by the said party, with his arguments and facts.* And the said parties have finally concluded all ther former relations, and all questions between them, as follows:

Now, therefore, this agreement witnesseth: That the said party of the second part, for the considerations after mentioned, herewith transfers and delivers to the party of the first part all the papers in his possession pertaining to the aforesaid claim, including his legal argument and the result of his researches in the matter, the particulars being specified in saparate inventory and receipt.

And doth hereby also covenant, promise, and agree to and with the party of the first part, that he, the party of the second part, shall and will convey to the party of the first part, or their President for them, all the lands and premises conveyed to him by deed bearing date the second day of October, A. D. 1840, executed by George S. Porter, President of the State Bank of Michigan, and recorded in the Register's Office, in Saginaw county, on the 6th day of October, A. D. 1840, in deed book B, on pages 321 and 322, as fully as the same were so conveyed, and free from all incumbrances by him, the party of the second part, except taxes: and as to them, the said party covenants and agrees that he will procure the said lands to be cleared from all tax incumbrance, and from the title of any alleged tax purchasers without charge for his own services, the party of the first part doing as after mentioned on their part, and

will also give any requisite explanation in the premises. And the party of the second part, in consideration of the payment, release, and agreements hereafter mentioned, releases, remises, *and forever discharges the party of the* first part from all claim or demand whatever in the premises either for professional service, money spent, and interest in the claim or control of the proceedings or otherwise, however. And the party of the first part, in consideration of the covenants, services, transfer, and release aforesaid, agree to pay the party of the second part on execution hereof the sum of *five hundred and twenty-five dollars*, and to pay on demand all money which the party of the second part may find to be necessary for clearing the tax-titles and taxes aforesaid, including any charges made by others for local services, and any expenses actually incurred by the party of the first part for the considerations above, hereby remise, release, and forever discharge the party of the second part of and from all claims, demands, accounts, and responsibilities whatever in the premises, except the matters and things herein and hereby agreed to be done, and for all other demands whatsoever.

In witness whereof, the party of the first part hath caused its President to execute these presents, and attached hereto its corporate seal, and the party of the second part hath set his hand and seal, the day and year first in these presents written.

T. TILESTON, [L. S.]
President.
CHAS. H. SEWART. [L. S.]

Witness—
JOHN PARKER. [L. S.]

The State of Michigan never assented to, or had any notice prior to January 1st, 1855, of the execution of either of said deeds of August 5th, 1852, of the said acts and doings of said Stewart in respect to the securities so as aforesaid received by him, on his said settlement with the

said River Raisin Bank, or of the notice so as aforesaid given by said Phenix Bank to the River Raisin Bank, not to pay the said draft for $7,900 so as aforesaid advanced to said Norton.

Section 31 of Article one, and section four of Article eight, and section one of "Schedule," of the Constitution of the State of Michigan, which took effect on the first of January, 1851, reads as follows, viz:

§ 31. Act 1. "The Legislature shall not audit nor allow any private claim or account."

§ 4. Act 8. "The Secretary of State, State Treasurer, and Commissioner of the State Land Office, shall constitute a Board of State Auditors to examine and adjust all claims against the State, not otherwise provided for by general law." * * * *

Schedule, § 1. "The common law, and the statute laws, now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the Legislature."

Section two of a statute of the State of Michigan, approved January 26th, 1848, reads as follows, viz:

Section 2. "It shall be the duty of the Attorney General to appear in behalf the State, before the Board of State Auditors, when they shall sit to audit claims against the State; and to that end, said Board shall give said Attorney General timely notice of the time and place of their meeting to audit such claims."

By an act of the Legislature of the State of Michigan, approved April 7th, 1851, sections forty-four and forty-seven of the Revised Statutes (of 1846) of said State were amended to read as follows, viz:

(*Here the Judge inserted a copy of the Act of* 1851 *organizing the Board of State Auditors under the present Constitution; to be found in the Session Laws of* 1851, *p.* 173, *and in* 1 *Comp. L. p.* 145.)

This constitution and these statutes continued in force until after the presentation, allowance, and payment to the plaintiffs of the said claim of the Phenix Bank, as hereinafter stated.

In the summer of 1853, the said Phenix Bank employed George V. N. Lothrop, Esq., a counsellor at law, residing at Detroit aforesaid, to take charge of the prosecution of said claim, against said State of Michigan, and delivered to him, as such employee and attorney, various letters and paper writings relating thereto; and, among others, the said deed of October 2d, 1840, and the said deed from Stewart to said Phenix Bank, of the date of August 5th, 1852. At that time Thomas Tileston was President of said Bank, and had been since January, 1840. Peter M. Bryson was Cashier, and had been since August, 1850, when he succeeded said Ogden in that office. Mr. H. Cary was Assistant President thereof, on the 20th of June, 1853, and thence until the expiration of the charter of said Bank.

The defendants are a banking corporation, doing business in the city of New York, duly created and organized by virtue of and according to the laws of the State of New York, and have been since about the 1st of January, 1854, by the name of the "Phenix Bank of the city of New York," and are hereinafter spoken of as the present Phenix Bank, while the former corporation is hereinafter spoken of as the old Phenix Bank.

At the time of the organization of the present defendants, as such corporation, the said Thomas Tileston was elected President thereof; said Peter M. Bryson, Cashier, and said H. Cary, Assistant President, and continued to be such officers until on or after the first of January, 1855.

Many of the stockholders of the old Phenix Bank became stockholders of the present Phenix Bank; and most of the subordinate officers of the former became like officers of the latter; and the present Phenix Bank purchased the

property and effects of the old Bank, *inter alia*, the said claim of the latter against the State of Michigan.

The said Lothrop, by virtue of his employment as aforesaid, on the 12th of May, 1854, presented the said claim to the Board of State Auditors of the State of Michigan, consisting of William Graves, Secretary of State; Bernard C. Whittemore, State Treasurer, and Porter Kibbee, Commissioner of the State Land Office, of the said State of Michigan, at a regular meeting of said Board, when all the said members thereof were present, but presented such claim on account of the present defendants; and, in support of such claim, presented and laid before said Board, as evidence of the equity and justice thereof, various paper writings, which, together, read as follows:

CLAIM OF THE PHENIX BANK.

JOHN DELAFIELD, *Agent for the State of Michigan*,
DR. *to Phenix Bank, N. Y.*

1838.

March 13.	For draft on Farmers and Mechanics' Bank, Detroit,.....	$8,500
" "	For draft on Bank River Raisin,.....	7,900
		$16,400

Both delivered to John Norton, Jr., Cashier, by order of Governor Mason, being for advance on State bonds.

Interest from 13th March, '38, to ———,.....

State of New York, City of New York.

John Delafield, of the city aforesaid, having appeared before the undersigned, Notary Public in and for the city of New York, and being duly sworn, deposed as follows: That in the years one thousand eight hundred and thirty-seven and eight, he was agent duly authorized by his Excellency Stevens T. Mason, Governor of the State of Michigan, to negotiate the sale of the bonds of the said State, and effect a loan for the State; that pending the negotia-

tion a large amount of the bonds were placed in deponent's hands for the purpose of sale, and the situation of the State having *required advances to be made* on the faith of said bonds, two several sums were procured for the State by deponent, and passed through his hands as agent, one for one hundred and fifty thousand dollars advanced by Prime, Ward & King, and the other for sixteen thousand four hundred dollars, by the Phenix Bank of New York; that the former was paid on two drafts by the Governor, and the latter by delivery to John Norton, Junior, Cashier of the Michigan State Bank, as Fiscal Agent for the State, of two drafts of the Phenix Bank on banks in the State of Michigan, having that amount of the funds of the Phenix Bank in their possession, that is to say, on the Farmers and Mechanics' Bank, Detroit, for eight thousand five hundred dollars, and on the Bank of the River Raisin for seven thousand nine hundred dollars; that the said last mentioned payment was made to the said Norton as the representative of the said Governor, duly authorized to treat with deponent in relation to the said loan, no less than in his capacity as Fiscal Agent, and was enclosed by deponent's desire in a letter to said Norton, of which the following is a copy:

PHENIX BANK,
New York, 18th March, 1838.

J. NORTON, Jr., Esq., *Cashier:*

DEAR SIR—Please receive herein my draft on Farmers and Mechanics' Bank, Detroit,..... $8,500 00
do Bank of River Raisin, Monroe,..... 7,900 00

$16,400 00

On account of advance made by this Bank on Michigan bonds deposited with John Delafield, Esquire, President.

Respectfully yours,

N. G. OGDEN,
Cash.

Which letter, with the contents, being delivered to the said Norton, he gave the following receipt therefor in the letter-book of the bank, at foot of the copy of said letter:

Received of the Phenix Bank the above letter.

JNO. NORTON,
Cash.

That the said payment was solicited by the said Norton, as an advance to the State on the said bonds, and made to and received by him as such, as appears by the above letter and receipt.

That the Governor subsequently entered into a negotiation with the Morris Canal and Banking Company for a disposal of the said bonds, and during the progress of the negotiation applied to deponent for possession of the bonds which were required for its success, promising to repay, out of the proceeds the advances made to the State; that in addition, it was also agreed and understood that all these proceeds and the State deposits were to be made at the Phenix Bank, and the deponent's recollection of that fact is confirmed by a memorandum to that effect made by him at the time, in answer to an inquiry propounded by Mr. Norton, as to the mode of repayment of the Michigan funds to the Phenix Bank. That deponent accordingly, on the faith of the said promises, and the faith of the State, pledged by their Governor in due exercise of a power delegated by statute, gave up all such bonds which were negotiated with the Morris Canal and Banking Company; that Messrs. Prime, Ward & King having advanced their $150,000 by drafts on London, at sixty days, then coming to maturity, became very urgent for a repayment by the 1st of May in said year, (1838,) and wrote several pressing letters to deponent, who, on his part urged the Governor, and received promises of payment from day to day, which were at length fulfilled, and the money paid by an advance procured from the Morris Canal and Banking Company; but the debt to the Phenix Bank not being equally urgent,

was allowed to await further payments from the said company, and never has, in fact, been paid, nor was any deposit made in the Phenix Bank by the State of Michigan, nor to their credit; that the said loan was not to the Michigan State Bank, with whom the Phenix Bank had no dealings nor intercourse, past or prospective, nor were the drafts given, as subsequently alleged, for collection, for the money was collected, and in banks equally satisfactory to the Phenix Bank, but the transaction was exclusively with the State, or on the faith of the bonds then in deponent's possession; that there was an express contract made by and with the Governor, by letter of deponent to him of 18th September, 1837, and duly accepted and ratified by him, that the proceeds of the loan and the State deposits were to pass through and be made in the Phenix Bank. And further deponent saith not. J. DELAFIELD.

Sworn and subscribed before me, a Notary Public of the city of New York, at the said city, this 10th day of June, A. D. 1840, the deponent having also subscribed his name to the preceding part of this deposition on a separate sheet of paper.

NATHL. DYETT, [L. S.]
Notary Public.

I, N. G. Ogden, Cashier of the Phenix Bank, New York, certify that the advance made by the said Bank of sixteen thousand four hundred dollars, in March, 1838, to the State of Michigan, stands regularly charged on the books of the Bank to the debit of "J. Delafield, agent for the State of Michigan," in which account is also entered a further advance made to the State by Prime, Ward & King, of $150,000, the State being credited with the amount thereof when deposited, and charged therewith when paid out on the draft of Stevens T. Mason, Governor.

[L. S.] Witness my hand and the seal of said Bank, at the city of New York, this 10th day of June, A. D. 1840.

N. G. OGDEN, *Cashier.*

TO THE BOARD OF STATE AUDITORS:

Gentlemen—I have the honor to lay before you, for your consideration, a claim of the Phenix Bank of New York city, against the State of Michigan. The long standing of the claim as well as the amount will entitle it to your fullest investigation. I do not hesitate to invite such inquiry, for, if the claim is not well founded both in law and equity, I ask nothing at your hands.

The facts of the case, and which will be fully established by the proofs I herewith submit, are as follows:

The claim of the Phenix Bank is for the sum of $16,400 advanced to the State, on the 13th of March, A. D. 1838.

This advance had its origin in the transactions growing out of the *Five Million Loan*, authorized by act of March 21st, 1837, (*Laws* 1837, *page* 152.) By this act, Governor Mason was entrusted with the execution of the negotiation of this loan. The terms, conditions, &c., of the negotiation of the loan was left entirely to his judgment, except in the following *five* particulars:

1st. The loan was not to exceed $5,000,000.

2d. To be redeemable at the pleasure of the State.

3d. As to the rate of interest.

4th. The loan was for internal improvements.

5th. The bonds were not to be sold below par.

Thus authorized, the Governor entered on the execution of his trust, and the following chronological table will be useful in this inquiry:

May 1*st*, 1837.—Governor Mason committed the whole negotiation to John Delafield. (See copy of letter hereto annexed, "A.")

September 18*th*, 1837.—Mr. Delafield apprised Governor Mason that he had made arrangement with a house to effect the sale of the bonds in London, and one of that house (Mr. King) would immediately go to London for that purpose. In the meantime $150,000 were to be advanced to the State on the bonds. (See letter annexed, "B.")

October, 1837.—Mr. King went to London.

January, 1838.—Governor Mason, in his annual message for this year, states the principal facts. (See Message 1838.)

January 6th, 1838.—Governor Mason sold $500,000 of State bonds to Oliver Newberry who sent them to New York for sale. (See Public Documents.)

January 6th, 1838.—Governor Mason drew two drafts, one for $90,000, and one for $150,000, which was to be advanced to the State, pending the negotiation of the bonds.

Soon after this, the London capitalists, alarmed by the appearance of other Michigan bonds in the New York market, broke off their negotiation with Mr. King, and refused to have anything further to do with the loan. Mr. King accordingly came home in disgust, refused to advance the $150,000 as agreed, and Governor Mason's drafts were therefore *protested*.

February 19th, 1838.—Governor Mason sent John Norton, Jr., Cashier for the Michigan State Bank and fiscal agent of the State, to New York, to make some provisions for the protested drafts.

February 24th, 1838.—Governor Mason, in pursuance of an arrangement made with Norton, on the evening of his departure, wrote to Mr. Delafield to furnish Norton further funds out of the loan. (See copy letter annexed, "C.")

Norton succeeded through Mr. Delafield in raising the $150,000 to take up Governor Mason's drafts by the drafts of Prime, Ward & King, on London, at sixty days.

He also obtained an advance from the Phenix Bank by two drafts of that Bank, one on the Farmers and Mechanics' Bank, at Detroit, for $8,500, and the other on the Bank of the River Raisin, for $7,900, making $16,400, the sum now in question.

Both of these advances were made expressly on the faith

and security of the bonds deposited in the hands of Mr. Delafield. (*See Mr. Delafield's Affidavit.*)

For the $16,400 advanced by the Phenix Bank, Norton expressly receipted as advanced on account of State Bonds deposited with Mr. Delafield. (*See copy in Delafield's Affidavit.*)

June 4th, 1838, Governor Mason made his sale of all the bonds to the Morris Canal Company; out of the proceeds of this sale it was proposed to pay Prime, Ward & King for their advances, and the drafts drawn for which were thus become or becoming due; but it was necessary to get the bonds which were in Mr. Delafield's hands, to pass them over to the Morris Canal Company; for this purpose Governor Mason, by written order, directed Mr. Delafield to hand the bonds over to Mr. Romeyn, saying, that the latter would hand him the "amount of Prime, Ward & King's charge, and account for advances to the State." (See copy of Governor Mason's letter, "D.")

On this order Delafield delivered up the whole of the bonds held by him; and thus the Phenix Bank was left without any security for its advances, except the honor and faith of the State.

The bonds were delivered up by Mr. Delafield on an express promise that out of the proceeds of the sale to the Morris Canal Company, the whole advances should be repaid. It was further agreed that all of the proceeds of that sale should be deposited with the Phenix Bank; on these pledges the bonds were surrendered, but not a dollar was ever deposited with the Bank, and their advances have never been to this day repaid. (See Delafield's Affidavit.)

At this very time, Governor Stevens T. Mason acknowledged the nature of this transaction by a letter, of which the following is a copy:

"NEW YORK, June 4th, 1838.

SIR:—John Norton, Esq., having received from you two drafts, one on the Farmers and Mechanics' Bank, of Detroit, for $8,500, and the other on the River Raisin Bank for $7,900, in adjusting our accounts, it becomes important to state, that when I left home, according to my impression, those drafts were not collected, but so soon as I learn that such is the case, I will cause the amount to be remitted to you.

"Yours, respectfully,

"S. T. MASON.

"JOHN DELAFIELD, ESQ."

The State seems to have had occasion to spend money faster than they got it, and Governor Mason did not keep his promise.

The Bank, by its Cashier, Mr. Ogden, commenced dunning Governor Mason in November, 1838, and I annex a series of letters which show that the Bank urged their claim early and earnestly.

Now, I believe I have established most unequivocally—

1st—That Governor Mason was authorized to obtain money on the bonds of the State.

2d—That he authorized John Norton, the Cashier of the State Bank, the Fiscal Agent of the State, to receive from Mr. Delafield advances, or money upon said bonds, or out of the proceeds.

3d—That Mr. Delafield obtained $16,400 from the Phenix Bank, and Norton, as Cashier of the said Bank and as such Fiscal Agent, (the precise capacity in which he was accredited to Mr. Delafield by Governor Mason,) receipted for such sum as an advance made on said bonds.

4th—That said transaction was, in the June following, expressly recognized by Governor Mason as done by his authority, with his approval, and on account of the State.

5th—That the security held by the Phenix Bank for their advances was given up on the plighted faith of Gov-

ernor Mason, that the proceeds of the loan should be deposited with the Bank, and they should be paid out of said proceeds.

6th—That this faith was violated, and the Phenix Bank has never been repaid a dollar to this day.

And as pertinent here, I call the attention of the Board to the following resolution, passed January 10th, 1837, (see *Laws of* 1837:)

"*Resolved*, by the Senate and House of Representatives of the State of Michigan, That John Norton, Junior, Cashier of the Michigan State Bank, be and he is hereby appointed Fiscal Agent of the Legislature."

This is the officer that Governor Mason accredited to Mr. Delafield; Governor Mason held his authority from the People and from the Legislature; Norton held his from the Legislature and from the Governor, and it was officers so accredited that Mr. Delafield and the Phenix Bank dealt with. It would be hard indeed to say who could render public faith sacred and trustworthy, if it failed in the hands of such public servants.

If the above are facts, and all the material facts, I believe there is not a man in the State who would not at once say, that the claim is just, and should be met at once.

Having established that this advance was made for the State, and to persons duly authorized to obtain it, and upon the faith of the securities of the State, I proceed to inquire whether there are any *defences* to the claim.

I will fairly and fully state every defence that I have ever heard *hinted* at. They are three in number:

First.—That Norton never credited this advance to the State.

The answer is obvious. The Phenix Bank had and could have nothing to do with the way Norton kept his accounts with the State, or whether he kept any. Had he embezzled all the funds of the State, it would have been no answer to the claims of the State creditors.

I could quote pages of legal authority to sustain this, but it would be an insult both to the common sense and to the conscience of this Board, for me to argue this proposition.

Besides, the claim of the Phenix Bank arises not from the time an entry might be made to the credit of the State, but from the moment an advance was made.

Still further, the Executive of the State *actually* knew of the advance soon after it was made, which was equivalent to an entry or credit as between the State and its Fiscal Agent.

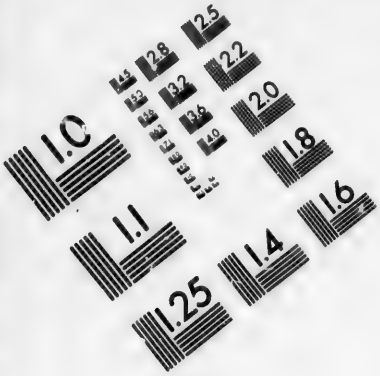
Second.—That the draft on the Bank of the River Raisin was never paid, (for it is conceded that the other draft was paid.) I do not know how the facts were, nor is it at all material.

The answer to this objection is apparent. Had not the Phenix Rank the funds in the River Raisin Bank? And did not Norton present the draft, demand payment, and if payment was refused, protest the draft and notify the Phenix Bank?

Delafield's affidavit shows that the funds were in the River Raisin Bank, and there is no pretence that payment was ever refused, and the draft protested and the Phenix Bank notified.

Now, no principle of mercantile law is better settled than this, that if a person having funds in the hands of a second party, makes a draft on those funds payable to a third person, or his order, and the payee neglects duly to present the draft, demand payment, and, if payment is refused, to protest the paper, the paper becomes absolutely his own; and if the drawee afterwards fails, and the funds are lost, the payee cannot resist the claim of the drawer. As between the drawer and the payee, under such circumstances, the draft becomes the same as so much money paid.

I therefore lay it down as an unquestionable legal prop-



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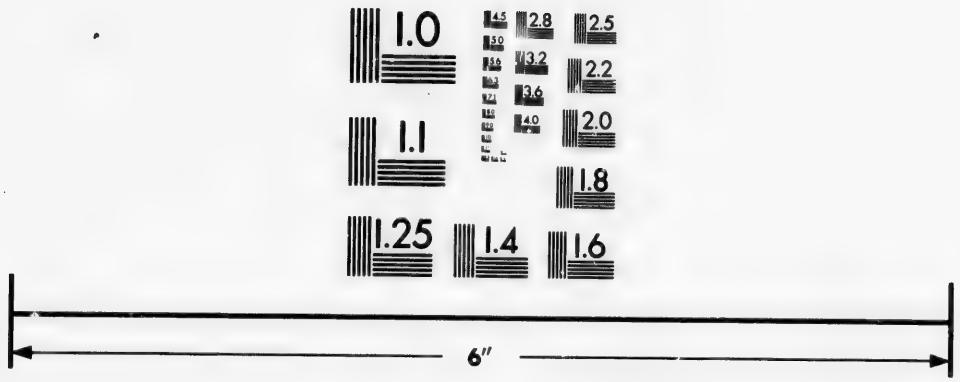

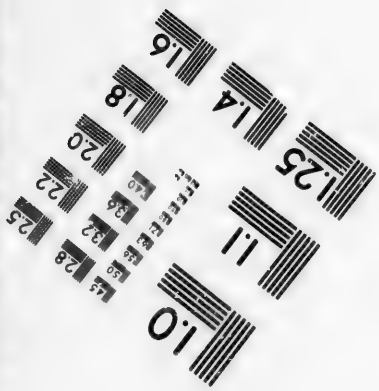

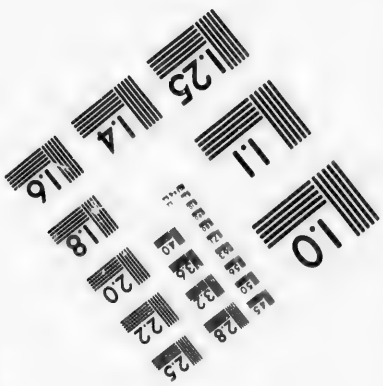

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osition, that this draft not having been presented, or payment not having been refused, and the draft thereupon protested, but being retained by the Fiscal Agent of the State, the draft was, as between the Phenix Bank and State of Michigan, in legal effect, *paid*.

No lawyer will dispute this: and I think no fair-minded business man will deny that such law is sound, wise, and just.

I do not know how the fact was. But I have been informed that payment was never refused, but some difference growing up between Norton and the River Raisin Bank about the mode of payment, Norton suffered the matter to run along until the questions of etiquette could be settled.

At any rate it is certain that the River Raisin Bank remained solvent long after this draft was drawn.

It is also certain that the draft was never protested, or the Phenix Bank notified of any dishonor of it.

It is also certain that the draft was never returned by Norton, or any one else, to the Phenix Bank.

If, therefore, these funds were actually lost, it is through the fault of the Fiscal Agent of the State entirely. If he chose to permit his funds to remain in the River Raisin Bank, it is no business to the Phenix Bank.

Third—That Norton received the drafts to *collect* them for the Phenix Bank.

This is without a particle of truth. Norton's own receipt directly contradicts it. Governor Mason's letter of June 4th, is wholly inconsistent with it. It is an excuse which was never whispered in the year A. D. 1838. I do not know that it was ever seriously set up as a defense, but if it was, it must have been at a period when the hard necessity had arrived of excusing a *political* sin or delinquency by transforming it into a *private* one. The only way to ward off the charge, that Norton was a faithless

and embezzling public officer, was to concede that he was a private scoundrel.

But the excuse is not only shabby, it is absolutely and purely false. Norton's receipt refutes it. All the contemporary evidence is against it. The Bank entered it in their books to the debit of "J. Delafield, agent of the State of Michigan." (*See Ogden's Certificate.*) And Mason treated it as a matter to be settled in his account with Delafield.

I now believe I have given a fair presentation of this claim. I have no hesitation in saying in the most solemn manner that, as a lawyer, I have no doubt that any court of justice, could it be brought before them, would at once render judgment for the claimants.

The circumstances of the State may have excused delay in acknowledging the claim; but I confess that I do not see how anything short of the grossest repudiation can justify its rejection.

The faith of the State, when pledged by its public officers duly authorized, should be held above all price. Nor in my judgment, when the justice is clear and unequivocal, should it ever weigh its honor against a technical defense.

As a citizen, I should claim for my beloved State a sensitiveness to its pledged faith and honor more delicate than that which is required in private life. But as the counsel for the claimants in this matter, I ask for no more exact measure of justice than the law applies in the dealings of individuals. I rest this case on the sentiment declared by Governor Barry in his annual message of 1842. Speaking of the general subject of the State indebtedness, he said:

"The same principles of equity which bind the consciences and govern the actions of individuals in dealings of a private character, ought ever to regulate the conduct of States. *More imperative indeed* upon them rests the obligation of such principles, since their views of justice

and uncontrolled will constitute the only rules of their action."

I am aware that the magnitude of this claim of itself makes it one of grave moment to the Board. I have therefore felt it especially incumbent on me to make in behalf of the claimants an incontestible case. I believe I have done so. And, if I have done so, I am sure that this Board will at once say that the honor of the State requires that the debt so long delayed shall at last be honorably acknowledged and paid.

GEORGE V. N. LOTHROP,
Of Counsel for Claimants.

Lansing, May 12th, 1854.

"A."

(*Mr. Lothrop's Exhibit "A," is the letter of instruction from Governor Mason to John Delafield, dated May* 1, 1837, *already copied into the Judge's finding of the facts.*)

"B."

Correspondence (copies of Letters) from J. Delafield.

NEW YORK, 18th September, 1837.

To His Excellency STEVENS T. MASON, *Governor, &c., Detroit, Michigan:*

SIR—Within the past few days, I have brought the Michigan loan authorized by an act of the Legislature, approved on the 21st of March last, to the notice of the capitalists of this city, assuming the responsibility of increasing the rate of interest, as suggested in your letter of 1st July.

The negotiation, as it now stands, embraces the whole loan of five millions, at the rate of one million each year.

One hundred and fifty thousand dollars shall be advanced and paid to J. Delafield, at the Phenix Bank, in

New York, for the State of Michigan, under the authority now held by him, which payment shall be made on or before the first day of February (qr.) next, or at an earlier period, if desired by the party paying the money.

The bonds to be delivered in New York on payment being made therefor, or security lodged with the Phenix Bank for the amount thereof.

One of the parties will forthwith proceed to Europe for the proper and effectual disposition of the whole loan, in accordance with the law, to be modified in the manner stated by you in your letter of the 1st July, and especially as regards the interest being payable in sterling, and both principal and interest in London, in which case *five per cent.* would be the nominal rate of interest.

A reasonable compensation to be allowed for the negotiation of the whole loan, with its management abroad and at home. It is stipulated that the money shall be placed to the credit of the State in the Phenix Bank, at a rate not less than the par value of the bonds; and if they are in sterling money and the interest at five per cent., as above stated, payable both in London, then the rate to be fixed at $4 44 per pound sterling.

The payments shall be made in the Phenix Bank within months after signing of the contract in Europe for the first million of dollars, except so much as is to be paid in New York on or before February next, as above stated, and each successive annual instalment shall be paid in New York within months of the annual period, dating from the day of the first contract in Europe.

If this arrangement for the negotiation of the whole loan is acceptable to you, it will be accomplished by my friend James G. King, Esq., of the house of Prime, Ward & King, who has agreed to go to Europe, and under my authority will no doubt produce the desired result, and place the credit of the State of Michigan on the highest position.

Alabama has issued bonds upon the principle herein described for one million of dollars, which are now in this city; for want of such advantages the loans of Indiana and Illinois have both failed, though the Commissioners have long been here and have advertised for offers.

Respectfully yours,

J. D.

As Mr. King is authorized to negotiate the entire loan under the delegated authority, I have deemed it altogether unadvisable to offer the bonds here, fearing that if any of them should appear in a European market in other than original hands, it would prejudice the negotiation.

No doubt we can obtain a premium here, but I hope in Europe so to operate as to render the loan more effective to Michigan, on better terms, and produce better general results.

Any movement here will assuredly be injurious; if, upon advice from Mr. King, we can entertain any doubt, it will then be sufficient to negotiate here. In the meantime I trust all your wants can be supplied through my means.

J. D.

6TH JANUARY, 1838.

His Excellency Governor MASON, *Detroit:*

This day I have letters from J. G. King, Esq., now in London, to whom I have committed the negotiation of the loan for $5,000,000 for the State of Michigan, as by authority vested in me by your Excellency.

Mr. King had received from me a rough proof of the bond expected to be issued under the amendment, and further advices from me. Mr. King expresses a hope that he can induce one of the strongest European houses to take the loan, making the interest payable in London, and secure for the State of Michigan the best possible aupices in the London market.

I would now request your Excellency to send me the remaining $500,000, to be in readiness for transmission with-

out delay, as I contemplate forwarding the balance of the bonds received from you at an early date.

It seems probable that the whole loan will be placed in train for the use of the State, and I confidently trust with signal benefit.

I notice the following qoutations:

Ala. 5 per cent. sterling, at 91.
Do. do. in dollars, at 82.

This illustrates the advantage of the amendment lately obtained.

J. D.

8TH JANUARY, 1838.

S. T. MASON, *Governor, &c.:*

It will be important to fix a rate of exchange, or name a rate on behalf of the State, to be assumed as a basis to make the final contracts, that we may be assured of returning a full value to the State. Believing that we can not rely on the continuance of present rates, I would suggest to your Excellency a rate of say 8 per cent. It may, and probably will be reduced to 5 per cent.—a rate too low for the benefit of the State. Exchange is now 9 to 9½, and declining; and upon a full view of the crops going to market, I think 8 per cent. should be the minimum rate assumed as basis for negotiation final.

You will perceive that does not bind.

"C."

(Private.)

(*Mr. Lothrop's Exhibit "C." is the letter of Gov. Mason to John Delafield of Feb.* 24, 1838, *already copied into the Judge's findings.*)

(Copy.)

MORRIS CANAL OFFICE,
New York, June 4th, 1838.

JOHN DELAFIELD, Esq.:

SIR—You will deliver to Theodore Romeyn, Esq., the whole amount of Michigan bonds in your possession (say

twelve hundred thousand dollars at six per cent. stock.) Mr. Romeyn will hand you the amount of Prime, Ward & King's charge, and account for advances to the State.

Respectfully,

Your obt. servt.,

STEVENS T. MASON.

Received, New York, June 4th, 1838, of John Delafield, Esq., the entire amount of Michigan State Bonds, heretofore placed in his hands as Agent.

S. T. MASON.

No witness was examined orally, by or before said Board in respect to such claim.

The Attorney General of the State of Michigan was notified by the said Board of State Auditors of the presentation of such claim, and was requested by said Board to appear before them in behalf of said State, and said Board gave him timely notice of the time and place of the meetings to audit said claim to enable him to attend before said Board, but he did not attend before said Board in respect to said claim.

The said Board kept said claim, and the said evidence submitted in support thereof, under advisement, until the 2d of December, 1854, on which day the said Board, at a regular meeting thereof, all the said members thereof being then present, did conclude and decide, upon the evidence submitted to them, and by them received in support of such claim, that said Phenix Bank was justly and equitably entitled for principal and interest on said claim, from March 13, 1838, to December 2d, 1854, to the sum of $35,603 74.

And thereupon on said 2d day of December, 1854, the said Board of State Auditors entered upon the record of its proceedings, in relation to such claim, as follows, viz:

"Claim of the Phenix Bank of New York against the State of Michigan for an advance of $16,400 on State bonds

delivered to John Norton, Jr., Cashier of the Farmers and Mechanics' Bank," (meaning and intending the said Michigan State Bank,) "Detroit, by order of Gov. Mason, for use of State, March 13th, 1838, and the interest thereon, the Board decided that upon the evidence produced, said Phenix Bank was justly and equitably entitled, for principal and interest on said claim, March 13th, 1838, to December 2d, 1854, to the sum of $35,603 74," (meaning and intending thirty-five thousand six hundred and three dollars and seventy-four cents,) which sum the said State of Michigan paid to the said defendants, for and on account of said false and fraudulent claim, on the fourth day of December, A. D. 1854.

The State of Michigan, on the 4th of December, 1854, in pursuance of said decision of said Board of State Auditors, and in satisfaction of the said sum, so as aforesaid decided by said Board to be due to said Phenix Bank from said State, paid to said Phenix Bank, the present defendants, the said sum of $35,603 74.

The members of said Board had not, nor had either of them, at the time said claim was presented, or while the same was under consideration, or before the aforesaid decision thereon, or before payment by the State of said sum of $35,603 74, any actual notice, or knowledge, or suspicion, of the settlements so as aforesaid made with the Michigan State Bank, and the River Raisin Bank, or with either of them, or of the existence of the said deed of October 2d, 1840, or of the said deed of August 5th, 1852, from said Stewart to the old Phenix Bank, or the deed of settlement and release between them of last said date, or of any of the aforesaid acts of said Stewart as agent of the old Phenix Bank.

The allegations in the said written communications by Mr. Lothrop to said Board of State Auditors, that the debt to the Phenix Bank never has in fact been paid, and that he would fairly and fully state to said Board every defence

he had ever heard hinted at, and the statement which he did therein make in regard to the alleged or supposed defences; and his omission and the omission of said Phenix Bank to notify said Board of the said notice, given by the Phenix Bank to the River Raisin Bank, not to pay said draft for $7,900; or of the settlement made by said Stewart with said Bank, or of the said settlement made by him with the Michigan State Bank; or of the collection by said Stewart of some part of the said securities so as aforesaid received by him from said River Raisin Bank, and of his substitution of the residue thereof for other property, with the assets of said Phenix Bank; or of the said deed of conveyance from Stewart to the old Phenix Bank, of the date of August 5th, 1852; or of the said deed of settlement and release between said Bank and Stewart, of the date of August 5th, 1852, were designed and intended to mislead the said Board of State Auditors as to the actual facts and merits of the case relating to said claim; and that such allegations were made, and such omissions were practiced, in the full belief that if the actual fact of the case, or such notice thereof as would lead to inquiry, should come to the knowledge of said Board, the said claim would be rejected and disallowed as unfounded in justice or equity.

There was no negligence on the part of the State of Michigan, or on the part of the members of the said Board of State Auditors, in not having obtained notice or knowledge, before said claim was presented to, or while it was pending before said Board, of the aforesaid acts and doing of said Stewart with the assent of the old Phenix Bank in respect to the securities so as aforesaid received from said River Raisin Bank, on the said settlement had with such Bank; or of the said two deeds of the date of August 5th, 1852, or either of them.

Neither the old Phenix Bank, nor the present Phenix Bank, ever received or was paid anything from, out of, or by reson of the property and effects taken by said Stewart

on said settlements which said Michigan State Bank, and said River Raisin Bank, or with either of them, nor was any of the property so as aforesaid received by said Stewart on such settlements ever transferred, in any manner, or for any purpose, to the old Phenix Bank, or to the present Phenix Bank, except that so as aforesaid conveyed by said Stewart to the old Phenix Bank, by the said deed of August 5th, 1852.

On the 9th of May, 1855, before the commencement of the present action, the State of Michigan by the Attorney General of the said State, demanded of the defendants in this action, that they should pay and refund to said State, the said sum of $35,603 74, with interest thereon, from the 4th day of December, 1854, which the said defendants refused to do, and the defendants have not so refunded, or paid to the said State, or any part thereof.

And hereupon the said defendants, by their counsel, duly excepted to each and every of the findings of fact of the said Judge.

NO. 16.

THE JUDGE'S CONCLUSIONS OF LAW.

1st. There was never any liability in equity and good conscience on the part of the State of Michigan to the Phenix Bank, to pay or refund to the latter the $16,400 which it advanced to John Norton, Jr., on the 13th of March, 1838, or any part thereof.

2d. The collection by Stewart of moneys from and upon the securities which he received from the River Raisin Bank on his settlement with that Bank, and his substitution of the residue of such security with the assent of the Phenix Bank for other property, without the assent of or notice to the State of Michigan, and the subsequent release of the 5th of August, 1852, by the Phenix Bank of

all liability of said Stewart as such agent, discharged the State of Michigan from all liability at law or in equity (if any previously existed) to repay the Phenix Bank any sum whatever by reason of the original advance to Norton of the said draft for $7,900.

3d. The conveyance on the 5th of August, 1852, by Stewart to the Phenix Bank, at the request of the latter, of the real estate which the Michigan State Bank conveyed to Stewart on the 2d of October, 1840, in payment and satisfaction of its liability as the recipient of the proceeds of said draft for $8,500, without the consent of, or any subsequent notice thereof, by the Phenix Bank to the State of Michigan, was an acceptance of such property by the Phenix Bank in its own right, and in its own account, and discharged the State of Michigan from all liability at law or in equity to the Phenix Bank (if any such liability previously existed) to pay to the Phenix Bank any sum whatever, by reason of its advance to Norton, on the 13th of March, 1838, of said draft for $8,500.

4th. It was the duty of the Phenix Bank to communicate to the Board of State Auditors of the State of Michigan during the pendency of said claim before said board, information of the acts of Stewart in relation to the property received by him from the River Raisin Bank which had been done with the assent of the Phenix Bank, of its settlement with, release of Stewart by the deed of August 5th, 1852; and of the conveyance of the same date by Stewart to the Phenix Bank of the property which the Michigan State Bank had conveyed to Stewart by the deed of the 2d of October, 1840.

5th. The decision of the Board of State Auditors, made on the 2d of December, 1854, being contrary to law, equity, and good conscience; and having been procured by fraud practiced on behalf of the present defendants in the proceedings before said Board in the prosecution of said claim, and the members of said Board and the State of Michigan

being then ignorant, without any fault or negligence on their part, of the existence of either of said two deeds of the date of August 5th, 1852, or of the collection of Stewart prior to the date last named of money upon some of the securities received by him from the River Raisin Bank or of his substitution with the assent of the Phenix Bank of the residue of such securities for other property; the said decision of the Board of State Auditors should be deemed to be and is null and void; and the plaintiffs are entitled to recover from the defendants the $35,603 74, which was paid by the former to the latter on the 4th of December, 1854, in pursuance and satisfaction of said decision, with interest thereon from the day last named until paid.

6th. The plaintiffs are entitled to recover their costs of this act on from the defendants.

SUPERIO. COURT OF THE CITY OF NEW YORK.

The People of the State of Michigan,
agst.
The Phenix Bank of the city of New York, } Judgment.

This action being at issue, and triable by the Court without a jury, and the trial of the issues of fact having been had on the 7th, 10th, and 11th days of October, 1859, by the Court, the Hon. Joseph S. Bosworth, Chief Justice, presiding, whose decision in writing has been filed with the Clerk, whereby judment is ordered for the plaintiffs for the sum of forty-seven thousand nine hundred and fifty-four dollars and twenty-four cents, together with the plaintiffs' cost of this action:

Now, on motion of J. L. Jernegan, Esq., of counsel for the plaintiffs, it is hereby adjudged, that the people of the State of Michigan, the plaintiffs, recover of the Phenix Bank of the city of New York, the defendants, the aforesaid sum of forty-seven thousand nine hundred and fifty-four dollars and twenty-four cents, together with the sum of

eight hundred and sixty dollars and eighty-eight cents costs and disbursements, amounting in the whole to the sum of forty-eight thousand eight hundred and fifteen dollars and twelve cents.

New York, November 28th, 1859.

GEO. T. MAXWELL, *Clerk.*

Doc. No. 8.

ghty-eight cents
e whole to the
l and fifteen dol-

WELL, *Clerk.*